CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 128

BONDHOLDERS COMMITTEE, MARLBOROUGH INVESTMENT COMPANY, FIRST MORTGAGE BONDS, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

No. 129

MARLBOROUGH HOUSE, INC., PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 5, 1941.

CERTIORARI GRANTED OCTOBER 13, 1941.

No. 9602

United States

Circuit Court of Appeals

For the Ninth Circuit.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

BONDHOLDERS COMMITTEE,
MARLBOROUGH INVESTMENT CO.,
FIRST MORTGAGE BONDS, a corporation,
Respondent.

Transcript of the Record

Upon Petition to Review a Decision of the United States Board of Tax Appeals.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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APPEARANCES:

For Taxpayer:
HAROLD L. SCOTT, Esq.,
WM. Z. KERR, Esq.

For Comm'r:
EDWARD C. ADAMS,
J. D. HUGHES, Esq.

Docket No. 90486

BONDHOLDERS COMMITTEE,
MARLBOROUGH INVESTMENT CO.,
FIRST MORTGAGE BONDS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES

1937

Sept. 1—Petition received and filed. Taxpayer notified. (Fee paid).

Sept. 1—Copy of petition served on General Counsel.

Oct. 12—Motion to dismiss (Rule 5 (e), filed by General Counsel.

Oct. 15—Hearing set November 3, 1937, on motion.

Nov 1—Amended petition filed. 11/2/37 copy served.

1937

Nov. 3—Hearing had before Mr. Murdock on motion to dismiss—denied.

Nov. 3—Order denying motion to dismiss and allowing respondent usual time to answer, entered.

Nov. 17—Answer to amend petition filed by General Counsel.

Nov. 27—Notice issued placing proceeding on Seattle, Wash., Calendar. Answer served.

1938

Aug. 1—Hearing set Sept. 19, 1938, Seattle, Washington.

Sept. 29—Hearing had before Mr. Kern on merits. Motion to consolidate dockets 90486, 90487 and 90452, granted. Petitioner's brief due 10/29/38; respondent's brief 12/28/38; petitioner's reply 1/12/39. Entry of appearance of Wm. Z. Kerr, filed.

Oct. 18—Transcript of hearing 9/29/38 filed.

Oct. 27—Brief filed by taxpayer. 10/27/38 copy served on General Counsel.

1939

Jan. 27—Motion for leave to file the attached brief, brief lodged, filed by General Counsel. 1/28/39 granted.

Feb. 27—Motion for leave to file the attached reply brief, reply brief lodged, filed by taxpayer. 3/1/39 granted.

1939

Mar. 2—Copy of motion and reply brief served on General Counsel.

Nov. 9—Findings of fact and opinion rendered, John W. Kern, Div. 16. Decision will be entered under Rule 50.

1940

Feb. 17—Agreed computation of deficiency filed.

Feb. 26—Decision entered, John W. Kern, Div. 16. [1*]

May 13—Stipulation of venue filed.

May 13—Petition for review by United States Circuit Court of Appeals, Ninth Circuit, with assignments of error filed by General Counsel.

May 22—Proof of service filed by General Counsel. (3).

June 14—Certified copy of an order from the 9th Circuit extending the time to July 31, 1940 to complete and transmit the record, filed.

July 15—Order from 9th Circuit consolidating dockets 90452, 90486 and 90487, for record, briefing, hearing and decision; that there shall be but one consolidated statement of evidence; that a complete transcript of record in docket 90486 only and the abbreviated record in dockets 90452 and 90487 be printed under one cover; that

*Page numbering appearing at foot of page of original certified Transcript of Record.

1940

there shall be no duplication of documents in the consolidated record as printed; and that the reviews shall have the same force and effect as if a separate record had been filed in each case, filed.

July 19—Certified copy of order from the 9th Circuit extending the time to September 15, 1940 to complete and transmit the record, filed.

Aug. 7—Agreed consolidated statement of evidence filed.

Aug. 7—Statement of points filed by General Counsel—proof of service thereon.

Aug. 7—Designation of portions of record filed by General Counsel—agreed to and proof of service thereon. [2]

Docket No. 90486

Appeal of:
Bondholders Committee,
Marlborough Investment Co.,
First Mortgage Bonds,
500 Insurance Building,
Seattle, Washington.

PETITION

The above named taxpayer hereby appeals from the determination of the Commissioner of Internal Revenue set forth in his deficiency letter IT:E:4,

GMC:90D, dated June 9, 1937, and as the basis of its appeal sets forth the following:

Jurisdiction of the Board

1. The taxpayer is a corporation organized under the laws of the State of Washington, with its principal office at 500 Insurance Building, Seattle, Washington.

2. The deficiency letter (copy of which is attached) was mailed to the taxpayer June 9, 1937 and states a deficiency of the taxable period from July 1, 1933 to November 20, 1933 in the amount of Fourteen Hundred Ninety-eight Dollars and two Cents ($1,498.02) and penalty in the amount of Three Hundred Seventy-four Dollars and fifty-one Cents ($374.51).

3. The taxes in controversy are income taxes for the taxable period from July 1, 1933 to November 20, 1933 in the amount of Fourteen Hundred Ninety-eight Dollars and two Cents ($1,498.02) and penalty in the amount of Three Hundred Seventy-four Dollars and fifty-one Cents ($374.51), a total of Eighteen Hundred Seventy-two Dollars and Fifty-three Cents ($1,872.53), and are less than $10,000.00, to-wit: Eighteen Hundred Seventy-two Dollars and fifty-three Cents ($1,872.53).

Assignments of Error

4. The determination of tax contained in the said deficiency [3] letter is based upon the following:

That the Commissioner of Internal Revenue

errored in arriving at the cost of the Marlborough House Apartment and that he has not allowed as a deduction, depreciation based on the reasonable life of the fixed assets nor upon the actual cost of the property to the bondholders committee. Furthermore, no allowance has been made for accrued taxes nor interest on the bonded indebtedness.

Statement of Facts

5. That all income received during the year 1933 was received in contemplation of a corporation being organized, holding the title to the Marlborough House, an apartment building in Seattle.

That all income received prior to the date of incorporation was reported on the return of the said corporation and without any attempt to evade or defraud the Government of any tax that might be due.

That the Commissioner has not allowed as the cost of the property, its original cost to the bondholders, but has used as a basis for depreciation, the bid price at a foreclosure sale. Furthermore, the Commissioner has not allowed interest on the outstanding bonded indebtedness nor taxes accruing for the period in question.

Wherefore, Petitioner prays that the Board may hear and determine its appeal and the petitioner further prays that the Board may give and grant such other and further relief as in the premises the Board may deem fit and proper, and if the Board should find that the petitioner has overpaid its taxes for the period under review, the Board may order

and direct refund of said taxes overpaid with interest thereon.

HAROLD L. SCOTT
500 Insurance Bldg., Seattle, Wn.
Counsel for Taxpayer [4]

State of Washington
County of King—ss.

I, T. H. Lovell, being first duly sworn, says he is a member of the Bondholders' Committee for Marlborough Investment Co., a corporation organized under the laws of the State of Washington, and the taxpayer named in the foregoing petition, and as such is duly authorized to verify the foregoing petition, and is familiar with the statements therein contained, and that the facts therein stated are true.

T. H. LOVELL

Subscribed and sworn to before me this 28th day of August, 1937.

(Seal) O. N. GALER
Notary Public in and for the State of Washington, residing at Seattle. [5]

EXHIBIT B

Treasury Department
Washington, D. C.

June 9, 1937

Bondholders Committee, Marlborough Investment Co.,
First Mortgage Bonds,
c/o H. L. Scott,
305 Insurance Building,
Seattle, Washington

Sirs:

You are advised that the determination of your income tax liability for the taxable year(s) July 1, 1933 to November 20, 1933 discloses a deficiency of $1,498.02 and penalty of $374.51 as shown in the statement attached.

In accordance with section 272(a) of the Revenue Act of 1932, as amended by section 501 of the Revenue Act of 1934, notice is hereby given of the deficiency mentioned. Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing and filing of this form will expedite the

closing of your return(s) by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,
Commissioner.

By CHAS. T. RUSSELL
Deputy Commissioner.

Enclosures:
Statement
Form 870
Exhibit A [6]

Statement

IT:E:4

In re: Bondholders Committee
Marlborough Investment Co.
First Mortgage Bonds,
c/o H. L. Scott
305 Insurance Building
Seattle, Washington

Tax liability for taxable year July 1, 1933 to November 20, 1933.

Income Tax
Liability—$1,498.02.
Assessed—None.
Deficiency—$1,498.02.
Penalty—$374.51.

The deficiency shown herein is based upon the report dated November 29, 1935, prepared by Reve-

nue Agent Herman E. Black, a copy of which was transmitted to you.

Careful consideration has been given to your protest dated January 7, 1936 in connection with the report of the internal revenue agent in charge, and the information submitted at a conference held in the office of that official.

This office is in accord with the findings of the revenue agent.

The records of the Bureau do not show that a return was filed. Section 3176 (Revised Statutes of the United States, as amended) provides that the collector or deputy collector shall make the return or list from his own knowledge and from such information as he can obtain through testimony or otherwise.

Section 291 of the Revenue Act of 1932 provides that in case of any failure to make and file a return within the time prescribed by law or prescribed by the Commissioner in pursuance of law, 25 per centum of the tax shall be added to the tax.

On or about May 10, 1932, Marlborough Investment Company and its successors in interest defaulted on the interest and other sinking fund requirements in connection with its first mortgage bonds. Shortly thereafter your committee, a bondholders protective committee, was organized. [7]

August 26, 1932, the mortgage trustee, National Bank of Commerce of Seattle, Washington, filed an action in Superior Court asking for judgment and decree of foreclosure. This action was resisted

by the record owners of the property, State Developers, Inc., a corporation, and Russell L. Cooley, an individual. Each of these parties was record owner of a one-half interest.

July 1, 1933, said bondholders committee purchased the interests of said owners by cash payment of $5,000.00 to State Developers, Inc., and $5,025.00 to Russell L. Cooley, and on same date the court entered its decree of foreclosure and judgment to the trustee in amount of $510,666.58 together with costs in amount of $6,344.90, a total of $517,011.48.

Your committee represented bonds in the amount of $441,100.00 par value which were deposited to the control of the committee in National Bank of Commerce of Seattle, Washington, under deposit A agreement. Outstanding bonds not deposited and not represented by the committee were in amount of $12,800.00 par value. Total bonds outstanding $453,900.00 par value.

September 30, 1933, the property, a modern apartment hotel, 81 apartments, 254 rooms, was sold by the sheriff of King County (Seattle), at public auction under the foreclosure decree and was purchased by you. Bid price: realty, $310,425.00; personalty $30,000.00; total $340,425.00.

Under date of November 2, 1933, articles of incorporation were drawn up and signed by members of your committee and others before a notary public, for a corporation under the laws of the State of Washington, by name of Marlborough House,

Inc. The articles were filed with Secretary of State and charter issued under date of November 10, 1933. Minute book of said corporation records first meeting of its board of directors was held in Seattle, Washington, November 21, 1933.

Minutes of said meeting (November 21, 1933) further record election of officers, a brief history of the bond issue, the committee, foreclosure by trustee, purchase by the committee at sheriff's sale for and on behalf of the depositing bondholders, certificate of purchase and bill of sale issued by sheriff to the committee; and that [8]

> "the committee has formed this corporation and hereby offers to transfer to this corporation all of the property purchased at said sheriff's sale, together with all of the rents and income heretofore collected or held by the committee less necessary expenses and obligations now outstanding, in consideration that the corporation issue its entire capital stock consisting of 4,411 shares par value $100.00 per share directly to the bondholders whose bonds have been deposited with the committee. That, in taking over said properties this corporation is to specifically assume and agree to carry out the obligations, liabilities, and debts heretofore undertaken by the committee in connection therewith."

Minutes of said meeting record adoption of resolution accepting the offer of your committee to transfer to the corporation all property both per-

sonal and real acquired by them at sheriff's sale, together with all rents and other income heretofore collected by them, less necessary expenses and obligations outstanding, in consideration of the issuance of all of the capital stock of the corporation to the committee.

It appears that all of your income and deductions were included in return filed by Marlborough House, Inc., for year 1933. Your committee had no income prior to July 1, 1933, and was not engaged in any business prior to that date.

The revenue agent and this office have concluded that your committee is liable for a separate return and the income prior to the date the corporation received its charter and between that date and the date it acquired the property, namely, November 21, 1933, is not taxable to the corporation, but to your committee. Reference is made to the following rulings appearing in Internal Revenue Bulletin Service:

(1) Office Decision No. 1016, Cumulative Bulletin No. 5 December 1921, page 231;

(2) Office Decision No. 1121, Cumulative Bulletin No. 5, December 1921, page 233;

(3) General Counsel Memorandum No. 1122, Cumulative Bulletin No. VI-1, June 1926, page 256. [9]

It is further concluded that your committee is not a "Trust" but is taxable as a corporation under the

provisions of article 1314, Regulations 77, Revenue Act of 1932. Reference is also made to Treasury Decision No. 3598 appearing in Internal Revenue Cumulative Bulletin III-1, June 1924, page 489.

Adjustments to Net Income

Net income, July 1, to October 31, 1933 per schedule 2		$ 9,963.33
As corrected, July 1, to November 20, 1933		10,894.69
Net adjustment as computed below		$ 931.36
Unallowable deductions and additional income:		
(a) One-third of net income November 1 to November 20, 1933 per revenue agent's report on transferee of taxpayer, Marlborough House, Inc., 1/3 of $2,794.08 equals		$ 931.36
Net adjustment as above		$ 931.36

Taxable Year Ended October 31, 1933.

Net income as disclosed by books July 1 to October 31, 1933		$ 570.41
As corrected, July 1, to October 31, 1933		9,963.33
Net adjustment as computed below		$ 9,392.92
Unallowable deductions and additional income:		
(b) Taxes accrued unallowable	$3,394.55	
(c) Depreciation unallowable	5,998.37	$ 9,392.92
Net adjustment as above		$ 9,392.92

[10]

Explanation of Adjustments

(a) Self-explanatory.

(b) $3,394.55. Book income for taxable year July 1 to October 31, is charged with taxes accrued in amount of $3,394.55. These taxes were a lien on the property prior to its acquisition by taxpayer, hence are not deductible from income and are held to be a part of the cost of the property.

(c) $5,998.37. Reference is made to exhibit A.

Depreciation per books	$6,938.66
Depreciation allowable, exhibit A	940.29
Depreciation disallowed	$5,998.37

Depreciation is allowed from date of acquisition by sheriff's sale, September 30, 1930.

Inasmuch as the equity of your committee prior to sheriff's sale was disposed of by the sale without diminution for depreciation, you sustained no loss by depreciation during such period.

Analysis of income and expense per books. Bondholders Committee and transferee corporation, Marlborough House, Inc.

	July 1, to October 31, 1933	November 1, to December 31, 1933	July 1, to December 31, 1933
Income			
Rentals	$20,752.06	$10,299.53	$31,051.59
	70.80	155.25	226.05
Expense	$20,822.86	$10,454.78	$31,277.64
			[11]
Salaries and wages	$ 3,846.11	$ 1,917.07	$ 5,763.18
Rental commissions	1,046.18	515.26	1,561.44
Power and light	1,407.12	525.36	1,932.48
Telephone	922.61	831.44	1,754.05
Maintenance	510.57	354.84	865.41
Laundry	388.51	211.54	600.05
Fuel	451.65	505.30	956.95
Insurance	263.68	109.53	373.21
Water	268.90	91.60	360.60
Supplies	212.06	69.50	281.56
Sundry	284.25	207.57	491.82
Interest	317.60		317.60
	$ 9,919.24	$ 5,339.01	$15,258.25
Depreciation	6,938.66	3,469.33	10,407.99
Taxes accrued	3,394.55	1,697.27	5,091.82
	$20,252.45	$10,505.61	$30,758.06
Net income	$ 570.41	($ 50.83)	$ 519.58

Computation of Tax

Net income for taxable year	$10,894.69
Income tax at 13¾ percent	$ 1,498.02
Total tax assessable	$ 1,409.02
Total previously asssesed (no return filed)	None
Additional tax to be assessed	$ 1,498.02
25 percent penalty	$ 374.51

[12]

Bondholders Committee
Marlborough Investment Co.

Period ended 11/20/33

EXHIBIT A

Depreciation Schedule—Period ended October 31, 1933

Property acquired at sheriff's sale September 30, 1933. Transferred to corporation, Marlborough House, Incorporated, November 1, 1933. One month depreciation allowable to you.

		Depreciation 10/1 to 10/31/33 inclusive.
Building: Marlborough Apartment Hotel constructed in 1927-1928; 81 apartments, 254 rooms, approximate cost when erected, $525,000.00; estimated remaining life from 10/1/1933, 45 years.		
		1 Month
Cost as shown below, $288,620.54	45 yrs.	$ 534.48
Furniture and equipment Estimated composite life 9 years		
43,827.57	9 yrs.	405.81
Cost of assets acquired by you at sheriff's sale:		
Sinking fund on deposit with W. D. Perkins & Co.		$ 22,604.18
Prepaid insurance and cash		339.66
Physical property		356,094.45
		$379,038.29

Subsequent to sheriff's sale you paid sundry additional costs, (certificates of foreclosure and other legal expense) in total amount of $227.21. It is concluded that these are a part of the cost of the physical property, making its total cost $356,321.66 as of October 30th.

For purpose of depreciation this cost is allocated in the ratio of the assessed valuations for year 1933 as follows:

	Assessed Valuation	Per Cent	Cost Allocated
Land	$ 10,850.00	6.7	$ 23,873.55
Building	131,750.00	81	288,620.54
Furniture and equipment	20,000.00	12.3	43,827.57
	$162,600.00	100	$356,321.66

[Endorsed]: U.S.B.T.A. Filed Sept. 1, 1937. [13]

EXHIBIT B

United States Board of Tax Appeals

Docket No. 90486

BONDHOLDERS COMMITTEE,
MARLBOROUGH INVESTMENT CO.,
FIRST MORTGAGE BONDS,
500 Insurance Building, Seattle, Washington,
Petitioner

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

AMENDED PETITION

The above named taxpayer hereby appeals from

the determination of the Commissioner of Internal Revenue set forth in his deficiency letter IT:E:4, GMC:90D, dated June 9th, 1937, and as the basis of its appeal sets forth the following:

Jurisdiction of the Board

1. The taxpayer is a corporation organized under the laws of the State of Washington, with its principal office at 500 Insurance Building, Seattle, Washington.

2. The deficiency letter (copy of which is attached) was mailed to the taxpayer June 9, 1937, and states a deficiency of the taxable period from July 1, 1933, to November 20th, 1933, in the amount of Fourteen Hundred Ninety-eight Dollars and Two Cents ($1,498.02), and penalty in the amount of Three Hundred Seventy-four Dollars and Fifty-One Cents ($374.51).

3. The taxes in controversy are income taxes for the taxable period from July 1, 1933, to November 20, 1933, in the amount of Fourteen Hundred Ninety-eight Dollars and two Cents ($1,498.02) and penalty in the amount of Three Hundred Seventy-four Dollars and Fifty-One Cents ($374.51), a total of Eighteen Hundred Seventy-two Dollars and Fifty-three Cents ($1,872.53), and are less than $10,000.00, to-wit: Eighteen Hundred Seventy-two Dollars and fifty-three Cents. ($1,872.53.)

Assignments of Error

4. The determination of tax contained in the

said deficiency letter is based upon the following errors. [14]

(a) The Commissioner of Internal Revenue has erred in attempting to tax as an association or corporation any income which came into the hands of the Bondholders' Committee during the period July 1st to November 20th, 1933.

(b) Furthermore, that if such income is taxable there must be allowed as a deduction some such income depreciation based on the reasonable life of the fixed assets and the cost of the assets.

(c) Furthermore, deduction should be allowed for accrued taxes and interest on bonded indebtedness.

Statement of Facts

5. The facts upon which the petitioner relies as a basis of this proceeding are as follows:

(a) That the bondholders' committee was organized by the bondholders for the purpose of protecting whatever rights or interest the bondholders had under a trust mortgage signed by the Marlborough Investment Company.

(b) That on or about May 10th, 1932, the Marlborough Investment Company and its successors in interest defaulted on the interest and other sinking fund requirements in connection with its first mortgage bonds.

(c) That on August 26th, 1932, the mortgage trustee filed an action in the Superior Court of King County, Washington, asking for judgment

and decree of foreclosure of the outstanding bond issue.

(d) That for the purpose of protecting its right title and interest the bondholders' committee acquired whatever right title and interest the State Developers, Inc., and Russell L. Cooley had in the real estate known as the Marlborough Apartment House, and furthermore acquired from the trustee the title to the above mentioned real property, through the surrender of bonds of the Marlborough Investment Company totaling Four Hundred Fifty Three Thousand, Nine Hundred Dollars, ($453,900.00), par value.

(e) Furthermore, all furnishings in the apartment house above mentioned were acquired by the trustee at foreclosure sale.

(f) That during the period, July 1st to November 20th, 1933, the bondholders' committee organized for the purpose of protecting whatever right title and interest the bondholders had in the above mentioned real property, accepted all rents received and paid all operating expenses during the period above mentioned.

(g) That the bondholders' committee was organized to hold title to the property pending liquidation. [15]

Wherefore, Petitioner prays that the Board may hear and determine its appeal and the petitioner further prays that the Board may give and grant such other and further relief as in the premises the

Board may deem fit and proper, and if the Board should find that the petitioner has overpaid its taxes for the period under review, the Board may order and direct refund of said taxes overpaid with interest thereon.

HAROLD L. SCOTT,
500 Insurance Bldg., Seattle, Wn. Counsel for Taxpayer. [16]

State of Washington,
County of King—ss.

I, T. H. Lovell, being first duly sworn, says he is a member of the Bondholders' Committee for Marlborough Investment Co., a corporation organized under the laws of the State of Washington, and the taxpayer named in the foregoing petition, and as such is duly authorized to verify the foregoing petition, and is familiar with the statements therein contained, and that the facts therein stated are true.

T. H. LOVELL

Subscribed and sworn to before me this 30th day of October, 1937.

[Seal] O. N. GALER,
Notary Public in and for the State of Washington, residing at Seattle.

For Exhibit "A" see Exhibit "A" attached to Petition.

[Endorsed]: U. S. B. T. A. Filed Nov. 1, 1937. [17]

[Title of Board and Cause.]

ANSWER TO AMENDED PETITION

Comes now the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the amended petition filed herein, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the amended petition.

2. Admits the allegations contained in paragraph 2 of the amended petition.

3. Admits that the tax in controversy are income taxes and penalty for the taxable period from July 1, 1933 to November 20, 1933, inclusive, but denies the remaining allegations contained in paragraph 3 of the amended petition.

4. Denies that the respondent committed error as alleged in subparagraphs (a), (b) and (c) of paragraph 4 of the amended petition. [18]

5 (a), (b), (c). Admits the allegations contained in subparagraphs (a), (b) and (c) of paragraph 5 of the amended petition.

5 (d). Admits that for the purpose of protecting its right, title and interest, the petitioner acquired whatever right, title and interest the State Developers, Inc., and Russell L. Cooley had in the real estate known as the Marlborough Apartment House, and that the petitioner acquired from the trustee the title to the above-mentioned real property, but denies the remaining allegations contained

in subparagraph (d) of paragraph 5 of the amended petition.

5 (e). For lack of information, sufficient to form a belief as to the truth or falsity thereof, denies the allegations contained in subparagraph (e) of paragraph 5 of the amended petition.

5 (f), (g). Admits the allegations contained in subparagraphs (f) and (g) of paragraph 5 of the amended petition.

Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that petitioner's appeal be denied.

(Signed) J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:
CHESTER A. GWINN,
JOE D. HUGHES,
Special Attorneys,
Bureau of Internal Revenue.
JH/HNP 11-10-37

[Endorsed]: U.S.B.T.A. Filed Nov. 17, 1937. [19]

[Title of Board and Cause.]

FINDINGS OF FACT AND OPINION

X corporation erected an apartment building in 1927 and issued its bonds in the amount of $500,000, secured by a mortgage on this prop-

erty. In 1932 X defaulted on these bonds and a bondholders' protective committee was formed under a deposit agreement which gave it broad powers. This committee instructed the trustee under the mortgage to foreclose, and at the foreclosure sale the committee bid in, with the bonds deposited with it plus cash, the property for $340,425. Thereafter the committee held and operated the property for several months and later transferred it to a new corporation, which issued all its stock to the depositing bondholders of X. HELD, these acts constituted a reorganization and the basis for depreciation of the property in the hands of the committee and the new corporation is the same as the basis in the hands of X, following Commissioner v. Kitselman, 89 Fed. (2d) 458, and Commissioner v. Newberry Lumber & Chemical Co., 94 Fed. (2d) 447; HELD, FURTHER, that the bondholders' committee was not a liquidating trust but was an association taxable as a corporation as to the income received by it while it held and operated the property, and that since it failed to file any return of such income it was liable for an additional tax of 25 percent; HELD, FURTHER, that under the facts the building acquired by petitioners had an economic and useful life of 30 years from July 1, 1933, and the rate of depreciation should be fixed accordingly.

Wm. Z. Kerr, Esq., and Harold L. Scott, C. P. A., for the petitioners.

Edward C. Adams, Esq., for the respondent.

These proceedings, consolidated for hearing, involve deficiencies in income tax liability. In Docket No. 90486, wherein Bondholders Committee, Marlborough Investment Co., First Mortgage Bonds is petitioner, the deficiency is in the sum of $1,498.02, representing [20] income determined by respondent to have been received by this petitioner during the period July 1 to November 20, 1933, inclusive, plus an additional tax of 25 percent for failure to file a return of such income. In Docket No. 90487, wherein Marlborough House, Inc., is petitioner, the deficiency determined by respondent is in the sum of $245.33 and involves the income tax liability of that petitioner for the period of November 1 to December 31, 1933, inclusive. The same party is petitioner in Docket No. 90452, which involves a deficiency determined by respondent for the year 1934 in the sum of $441.76 and for the year 1935 in the sum of $1,120.35. In the two proceedings in which Marlborough House, Inc., is petitioner those parts of the deficiencies are in issue which result from respondent's determination that the basis for depreciation of the property owned by petitioner is the price bid and paid for it at a foreclosure sale in 1933, and that the estimated remaining life of the property was 45 years. Petitioner claimed a greater basis and a shorter life for the property in calculating depreciation. In the pro-

ceeding in which the bondholders' committee is petitioner the deficiency results from respondent's determination that petitioner is not a liquidating trust, but is an association taxable as a corporation and, therefore, should be taxed at corporation rates on the income received by it from July 1 to November 20, 1933, and, furthermore, that having filed no return of such income it was liable for an additional tax of 25 percent as penalty. The same issue of basis and rate of depreciation is present in this proceeding. Other issues presented by the pleadings in these proceedings were either not supported by any evidence at the hearing herein, and may therefore be considered as having been abandoned, or were expressly waived and conceded.

FINDINGS OF FACT.

Under date of May 20, 1927, the Marlborough Investment Co., a corporation, issued its bonds in the aggregate principal sum of $500,000, and to secure them executed a mortgage or deed of trust on certain real and personal property located in Seattle, Washington, being an apartment building known as the Marlborough House, together with the personal property situated therein, all of which it then owned. Default in the payment of these bonds occurred May 10, 1932, at which time the amount of outstanding bonds was $453,900.

Shortly after the default a bondholders' committee was organized, consisting of William D. Perkins, W. O. Bulette, and Harvey Lantz, and a written "Deposit Agreement" was executed by the

above three persons constituting the committee, in which the National Bank of Commerce of Seattle was designated as depository. The deposit [21] agreement as a whole is incorporated herein by reference. One especially pertinent provision is as follows:

> Section 2. Without derogation from the general powers hereby conferred upon the committee, the committee shall have power and authority to enforce, protect, discharge, collect, sue for, extend or adjust all rights at law or in equity attaching to said bonds and coupons thereto attached; to transfer any bond or coupon hereunder into its own name or the name or names of its nominees; to declare due and/or to request the trustee under said indenture to declare due the principal of any and all bonds, whether or not the same be deposited hereunder, and to revoke any such declaration; to dismiss and/or request the trustee under said indenture to dismiss, upon terms satisfactory to the committee, any suit or proceeding instituted by the committee and/or said trustee upon said bonds or under said indenture, and/or against the company to waive any default or defaults by the company under the terms of said bonds or the indenture securing the same; to request the trustee under said indenture to make such waivers; to apply for or secure the removal of any trustee and/or the substitution of other trustees under said indenture; to appoint additional depositaries under

this agreement, and to remove any depositaries and appoint successors thereto; to purchase or settle at such prices as they deem proper any claims against the company; to pay or cause to be paid taxes and/or assessments on the property described in the mortgaged lease; to effect or continue insurance thereon; to borrow or advance money or give guarantees for the purpose of carrying out any plan adopted by the committee for the purpose of protecting the mortgaged property and/or the interests of the depositors, including the payment of taxes and/or assessments on the mortgaged property, costs of operation of the mortgaged property, or for the purchase of claims against the company, or for the exercise of any power hereby granted to the committee, or for the purpose of making, in the discretion of the committee, advances to the depositors upon deposited bonds and/or coupons or upon certificates of deposit, or for such periods and upon such terms and conditions as the committee may decide; to pledge the deposited bonds and/or coupons as security for loans which the committee may deem necessary or proper for the protection of the mortgaged property and/or the interests of the depositors; to subordinate the lien of the indenture securing the deposited bonds to a new lien upon the mortgaged property for the purpose of borrowing and/or securing funds to protect the mortgaged property and the in-

terests of the depositors; to pledge or sell any deposited bonds or coupons or the avails thereof, or any other property at any time coming into the possession or control of the committee for the payment of any money so borrowed or agreed to be paid or advanced by the committee or for the performance of any other obligation incurred by the committee hereunder, or for the payment of any expenses incurred by the committee hereunder, or for the securing of any guaranty given by the committee; to exchange the deposited bonds and/or coupons, in whole or in part, for other securities or property; to sell, redeem, surrender, pledge or in any manner charge the deposited bonds and/or coupons as part of any plan adopted by the committee for the protection of the mortgaged property and/or the interests of the depositors; to institute, defend or become parties to, compound, forbear, settle or conduct any legal proceedings at law or in equity; to file or prove with any receiver, court or referee or committee, all or any part of the bonds and/or coupons deposited hereunder; to apply for receivers or the removal of receivers and for the termination of any receivership; to enter into arrangements for decrees [22] or to facilitate or hasten the course of any litigation; to accept and waive notices of every character in legal proceedings or otherwise; to make requests or demands upon the trustee under the

indenture securing said bonds; to consent to the issuance of receivers' certificates having priority over deposited bonds and/or coupons; to purchase any such certificates; to make and/or consent to such modifications in the indenture securing the bonds as the committee deems necessary and proper; to take such action as the committee deems necessary and proper to promote or to secure or prevent a sale of the mortgaged property upon foreclosure or otherwise; to prevent, to delay or to adjourn any such sale at its discretion; to bid or refrain from bidding at any such sale; to procure the organization of a new corporation or corporations, or to adopt or use any existing or future corporations; to take, hold, subscribe, pay for or otherwise give value for the securities and obligations of such corporation or corporations; to receive any new securities to be created and to vote upon the stock of any corporation now or in the future organized as part of any plan adopted by the committee for the protection of the depositors; to employ counsel, accountants, agents and assistants, and to pay the expenses thereof as part of the expenses of the committee, and to incur and discharge any and all expenses which the committee deems necessary and proper in functioning hereunder; to cause a new corporation to be formed to take over and/or acquire the mortgaged property, and to surrender and/or exchange the deposited bonds

and/or coupons, in whole or in part, for all or part of the stock of such corporation upon such basis of exchange as the committee may determine.

Bonds were deposited under the agreement to the extent of more than 97 percent of the whole. The holders of $441,100 of par value bonds came in under the deposit agreement, deposited their bonds thereunder, and authorized the bondholders' committee to act for them. The holders of $12,800 par value of bonds failed to deposit.

Under date of August 15, 1932, the bondholders' committee in writing requested the National Bank of Commerce of Seattle, the trustee under the trust deed and mortgage, to commence foreclosure proceedings because of the existing defaults in payments, and it did so on August 26, 1932.

While the foreclosure proceedings were pending, a written stipulation was entered into between certain of the defendants in the action and the trustee bank, as plaintiff, under date of July 1, 1933, by which the parties consented to the entry of a decree of foreclosure, and by the further terms of which the record owners of the property, i.e., State Developers, Inc., a corporation, and Russell L. Cooley and Lillian A. Cooley, his wife, each executed and delivered a quitclaim deed to all the property in question in consideration of the payment of the sum of $10,025 cash. In these deeds the name of the grantee was left blank.

The stipulation specifically authorized the plaintiff and/or its attorneys to insert the name of the grantee in the deeds. On September 28, 1938, the attorneys for the plaintiff, acting under the written authority conferred in the stipulation, filled in the name of [23] Russell C. Perkins, trustee for the bondholders' committee, as grantee in each of the deeds and on the same day Perkins, as trustee, executed and delivered a quitclaim deed covering all the property to Marlborough House, Inc., a corporation, which was organized by the bondholders on or about November 10, 1933, to take over and manage the property acquired by the bondholders at the foreclosure sale.

By the stipulation, the defendants further agreed to turn over to the plaintiff or its nominees, on July 1, 1933, the possession of the real and personal property involved. The bondho'ders' committee put up the money for the purchase of the property from the record owners and was made the nominee of the plaintiff, to whom the possession of the property was turned over.

The committee appointed Russell C. Perkins its agent to collect the rents and pay the expenses of the general management of the building and to take physical possession of the building for the committee. Perkins, on the first day of July, 1933, took physical possession of the property, and thereafter, until November 20, 1933, managed the property, collected the rents, and paid the expenses for the committee.

After the passing of title to this property from State Developers, Inc., and Russell L. Cooley and wife by the quitclaim deeds dated July 1, 1933, the foreclosure action was prosecuted to judgment and sale. The judgment and decree of foreclosure was entered in accordance with the stipulation and on the same date as the stipulation. The sheriff's foreclosure sale was held on the 30th day of September, 1933, and the bondholders' committee was the successful bidder and purchaser. The sale was thereafter duly confirmed by the Superior Court having jurisdiction of the matter and thereafter the sheriff's certificate of purchase covering the property was made out to the bondholders' committee and was duly assigned by the committee on the back page thereof to Marlborough House, Inc. After the year of redemption had gone by and the property had not been redeemed the sheriff's deed to the property was issued directly to Marlborough House, Inc., assignee of the bondholders' committee.

The bid price at the sheriff's sale submitted by the bondholders' committee was $340,425. This bid was accepted and the property was sold to the bondholders' committee. The purchase price was paid mainly by a surrender of the deposited bonds, the remainder by cash. The total amount of the bonds deposited with the sheriff to apply upon the purchase price of the real and personal property was $441,100. The holders of the nondeposited bonds were paid in cash their proportion of the purchase price after deducting their pro rata cost and ex-

pense of the foreclosure, which resulted in a payment to them of 73.58 percent of the face value of their bonds. The reason the [24] committee arrived at the bid price of $340,425 was twofold: First, the amount of the bid was governed to some extent by the amount of cash available for payment to the nondepositing bondholders, and, second, in the event of redemption of the property, the bondholders wished to assure themselves an adequate and fair return on their investment. Neither the fair market value of the bonds deposited with the committee, plus the cash used by it in partial payment of the bid price nor the fair market value of the property sold was in excess of $340,425 at the date of the foreclosure sale or on July 1, 1933.

Subsequent to the passing of the title from the record owners by the quitclaim deeds dated July 1, 1933, the bondholders' committee made no attempt to sell the property, since, because of the severe financial depression, there was no market for a sale.

Marlborough House, Inc., after it was organized and took possession of the property, issued all of its stock to the bondholders of the Marlborough Investment Co. who had deposited their bonds with the committee.

The steps taken by the bondholders' committee after the institution of the foreclosure suit and until the final vesting of title in Marlborough House, Inc., were pursuant to a plan of reorganization formulated by the committee for the benefit of

the bondholders pursuant to the power granted to it by the deposit agreement.

The basis for depreciation on the property in the hands of the bondholders' committee and Marlborough House, Inc., was the same as in the hands of the Marlborough Investment Co., less the depreciation already taken by the latter.

Bondholders Committee, the petitioner in Docket No. 90486, did not file an income tax return for any period. Marlborough House, Inc., the petitioner in Docket Nos. 90487 and 90452, at the time of filing its first return, included figures of gross income and deductions for the period between July 1 and December 31, 1933, which period covers the period of existence of the bondholders' committee and the first period of existence within the year 1933 of the corporation. The committee was an association taxable as a corporation.

The Marlborough Apartment Building is a modern 12-story apartment building of concrete, steel, and brick with two elevators, and was constructed in 1927. It contains approximately 81 apartments and 254 rooms. It is well constructed and probably is the best of its type as of the date of construction. As of July 1, 1933, it had an economic and useful life of 30 years.

OPINION.

Kern: The first issue to be determined in these proceedings has to do with the basis for depreciation of the property held by [25] petitioners. The

answer depends upon whether the acquisition by the bondholders of a corporation of the latter's property as a result of a foreclosure action, and the subsequent acquisition of the same property by another corporation organized for that purpose by the bondholders, constitute a reorganization within the meaning of the statute, so that the basis for depreciation of the property in the hands of the bondholders and later in the hands of the second corporation would be the same as the basis for depreciation in the hands of the first corporation against which the foreclosure action was brought. It is the contention of petitioners that there was such a reorganization. Respondent contends that there was no reorganization and that the basis for depreciation in the hands of the petitioners must be the amount bid for the property at the foreclosure sale.

The rule applied by us until recently in similar cases was that the basis for depreciation in the hands of foreclosing bondholders and corporations organized by them for the purpose of acquiring the property foreclosed was either the fair market value of the property at the time it was sold on foreclosure, or the fair market value of the bonds used by the bondholders in payment of the price bid at the foreclosure sale. Sunerest Lumber Co., 25 B. T. A. 375; Newberry Lumber & Chemical Co., 33 B. T. A. 150.

But in the case of Commissioner v. Kitselman, 89 Fed. (2d) 458 (certiorari denied, 302 U. S. 709), the Circuit Court of Appeals for the Seventh Cir-

cuit, in reversing our decision reported in 33 B. T. A. 494, held under similar circumstances that there was a reorganization as defined in section 112 (i) of the 1928 Act. To the same effect is Commissioner v. Newberry Lumber & Chemical Co., 94 Fed. (2d) 447 (reversing 33 B. T. A. 150), decided by the Circuit Court of Appeals for the Sixth Circuit. In that case the precise question presented by the instant proceedings was considered and it was held that the basis for depreciation in the hands of the corporation organized by the bondholders to take over the assets upon foreclosure would be the same as that of the mortgagor corporation. In the cases of Lucien H. Tyng, 36 B. T. A. 21 (affirmed on this issue, 106 Fed. (2d) 55), and Frederick L. Leckie, 37 B. T. A. 252, we indicated our intention to now apply the rule laid down in Commissioner v. Kitselman, supra, and Commissioner v. Newberry Lumber & Chemical Co., supra.

In one respect the instant proceedings differ from the Kitselman case and the Newberry Lumber & Chemical Co. case. The record here does not contain any evidence specifically relating to a plan of reorganization. There is testimony as to the different steps taken by which the second corporation acquired title after the foreclosure proceedings and the bondholders of the first corporation became the [26] stockholders of the second. There is also testimony to the effect that, since no market existed for the sale of the property, no attempt at liquidation was made by the bondholders

upon foreclosure. The deposit agreement, which was put in evidence and under which the committee was created, grants broad powers to the committee such as are usual in corporate reorganizations, and makes several references to a "plan" to be adopted by the committee for the purpose of protecting the interests of the depositors. In other words, the record discloses a reason for a reorganization rather than a liquidation, and also discloses the taking of steps usual in the most common type of reorganization. Cf. I. T. 2071, III-2, C. B. 34. As we said in William H. Redfield, 34 B. T. A. 967, 973: "It is not necessary, however, that such a plan of reorganization be evidenced by a formal written document, such as a contract or corporate minutes. It is sufficient if the circumstances indicate that the various steps taken were pursuant to a definite plan of reorganization." We can not doubt that under the circumstances present in these proceedings there was a plan of reorganization formulated by the committee and pursuant to which the steps were taken as disclosed by the record.

Holding as we do that there was here a reorganization within the meaning of sections 112 (a) (3) and 112 (i), Act of 1932, it follows that the basis for depreciation in the hands of petitioners will be the same as that in the hands of the predecessor corporation, the Marlborough Investment Co., less the depreciation already taken by such predecessor. Sec. 113 (a) (6), Act of 1932.

The next issue has to do with the income received by the Bondholders Committee, Marlborough Investment Co., First Mortgage Bonds, petitioner in Docket No. 90486, while it was in possession of the property from July 1 to November 20, 1933. The double question is raised of who should have returned this income and the rate at which it should have been taxed. This income was reported in the return of the new corporate petitioner, but the committee made no return of any kind. It is plain that this procedure was erroneous (see Chicago, Rock Island & Pacific Railway Co. v. Commissioner, 47 Fed. (2d) 990) and petitioners do not now contend otherwise. The petitioner Bondholders' Committee now contends, however, that it is taxable as a liquidating trust and not as a corporation, and that its failure to file a return was due to reasonable cause. Respondent, on the other hand, contends that the committee was an association doing business in an organized capacity, the net income of which was distributable to its members in proportion to the capital each had invested, and was, therefore, taxable as a corporation (see arts. 1312 and 1314, Regulations 77); and he further contends that an additional tax of 25 per centum is to be properly assessed against the committee [27] because of its failure to file a return pursuant to section 291 of the Revenue Act of 1932. The pertinent cases relied on by petitioner are Broadway-Brompton Buildings Liquidation Trust, 34 B. T. A. 1089, and Dolese & Shepherd Co., 30 B. T. A. 1171.

The pertinent case relied upon by respondent is Bondholders Protective Committee v. United States (U. S. Dist. Ct., So. Dist. Calif., Nov. 16, 1938).

Having held as we have that the acts of petitioners constituted a reorganization and that there was a plan of reorganization, we can not consistently adopt the view urged on us by petitioners that the primary object of the committee was the liquidation of the property and not its transfer to a newly organized corporation. A careful reading of the deposit agreement convinces us that the primary object of the committee was to hold, manage, and operate the property after foreclosure and pending the organization of the corporation which would take over the property in consummation of the plan of reorganization worked out by the committee. There is nothing in the record to indicate that liquidation by selling the property on the market was ever contemplated or desired. The mere fact that the committee had an incidental power to sell which could have been exercised in the event the contemplated reorganization was unsuccessful does not persuade us that the activities of the committee constituted a liquidation. Since it was not a liquidating trust but an association meeting the tests laid down in Morrissey v. Commissioner, 296 U. S. 344, we hold that the Bondholders Committee, Marlborough Investment Co., First Mortgage Bonds was properly taxable as a corporation on the income received by it.

Since the committee filed no return, it is liable for the additional tax of 25 per centum computed upon its taxable income, regardless of the reason for its failure to file such a return. Moulton Green, Trustee, 24 B. T. A. 1121; Harry D. Kremer, 31 B. T. A. 566.

The next issue involves the proper rate to be applied in ascertaining the amount of depreciation to be deducted by petitioners for the taxable years. It is the contention of petitioners that the apartment building had an economically useful life of only 30 years after July 1, 1933, instead of 45 years as determined by the respondent, and that respondent, in applying a rate of depreciation determined by estimating a remaining life of 45 years, did not include a reasonable allowance for obsolescence as required by section 23 (k) of the Act of 1932 and section 23 (l) of the Act of 1934. Two witnesses testified as experts on behalf of petitioners. They were familiar with the history of apartment house values in the city of Seattle and were familiar with the general location and general construction of the apartment house building owned by petitioners. Their testimony was that such an apartment building had a useful life of from 30 to 35 years, and they [28] justified their conclusion by relating case histories of other apartment buildings of similar type and location which had lost their value within such a period by reason of the construction of newer apartment buildings better and more suitably arranged with more modern plumbing and equipment,

and also by reason of the shifting of regions thought desirable for apartment buildings. They further testified to the effect that the economic and useful life of an apartment building was not as long as that of an office building because of the former's continuous use throughout the full day. While this evidence was, as respondent points out, rather general in its scope, it nevertheless embraced and definitely referred to the property in question, and since it is uncontradicted and we have no special knowledge on our own part which would justify its rejection, we can not disregard it. Pittsburgh Hotels Co. v. Commissioner, 43 Fed. (2d) 345, and cases there cited. Therefore, we must conclude that the apartment building owned by the petitioners had an economic and useful life of 35 years after it was constructed in 1927. Since under the pleadings the petitioners claim depreciation calculated on a basis of a useful life of the property of 30 years from July 1, 1933, we have made our finding to that effect. The rate of depreciation will be determined accordingly.

Petitioners have, apparently, abandoned the issues having to do with accrued interest on bonded indebtedness and accrued taxes. No evidence was adduced to substantiate the assignments of error in regard thereto which were set out in the petitions. The determination of the respondent as to these issues is affirmed.

Petitioners concede that the allocation of the basis for depreciation as between real and personal property is correctly made by respondent. They

also concede that the rate used as to the personal property is correct.

Reviewed by the Board.

Decision will be entered under Rule 50. [29]

United States Board of Tax Appeals
Washington

Docket No. 90486

BONDHOLDERS COMMITTEE, MARLBOROUGH INVESTMENT COMPANY, FIRST MORTGAGE BONDS,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the Findings of Fact and Opinion of the Board promulgated November 9, 1939, the parties herein having on February 17, 1940, filed an agreed recomputation, now therefore, it is

Ordered and decided: That there is a deficiency in income tax for the taxable period July 1, 1933 to November 20, 1933 in the amount of $136.45 and a penalty for said period in the amount of $34.11.

Enter:

(s) JOHN W. KERN,
Member.

Entered February 26, 1940. [30]

In the United States Circuit Court of Appeals for the Ninth Circuit

B. T. A.

Docket No. 90486

GUY T. HELVERING, Commissioner of Internal Revenue,

Petitioner on Review,

v.

BONDHOLDERS COMMITTEE, MARLBOROUGH INVESTMENT CO., FIRST MORTGAGE BONDS,

Respondent on Review.

STIPULATION OF VENUE

Pursuant to the provisions of Section 1002(b) of the Revenue Act of 1926, as amended by Section 519 of the Revenue Act of 1934, it is hereby agreed and stipulated that the decision of the United States Board of Tax Appeals in this proceeding may be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit.

(Signed) SAMUEL O. CLARK, Jr.,
Assistant Attorney General

(Signed) J. P. WENCHEL RLW
Chief Counsel,
Bureau of Internal Revenue.

W. J. KERR,
Attorney for Respondent on Review.

CRM/csl 3/14/40

[Endorsed]: U. S. B. T. A. Filed May 13, 1940.

[31]

In the United States Circuit Court of Appeals for the Ninth Circuit

[Title of Cause.]

PETITION FOR REVIEW AND ASSIGNMENTS OF ERROR

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Now comes Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys, Samuel O. Clark, Jr., Assistant Attorney General, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and Claude R. Marshall, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I.

JURISDICTION

That the petitioner on review (hereinafter referred to as the Commissioner) is the duly appointed, qualified and acting Commissioner of Internal Revenue, appointed and holding his office by virtue of the laws of the United States; that the respondent on review (hereinafter called the taxpayer) is an association taxable as a corporation, with its principal office at 500 Insurance Building, Seattle, Washington; [32] that the said taxpayer did not file a Federal income tax return for the taxable period July 1 to November 20, 1933, involved herein, but the Commissioner, under the authority granted by the provisions of Section 3176, U. S. Revised Statutes, as amended, made

a return for the said taxpayer on Form 1120 for the aforesaid taxable period for the Collection District of Washington, which said collection district is within the jurisdiction of the United States Circuit Court of Appeals for the Ninth Circuit, wherein this review is sought. The parties to this proceeding have also agreed and stipulated that the decision of the United States Board of Tax Appeals may be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to the provisions of Section 1002(b) of the Revenue Act of 1926, as amended by Section 519 of the Revenue Act of 1934.

The Commissioner seeks a review of the decision of the United States Board of Tax Appeals by virtue of the provisions of Sections 1141 and 1142 of the United States Internal Revenue Code.

II.

PRIOR PROCEEDINGS

On June 9, 1937, the Commissioner, in accordance with Section 272(a) of the Revenue Act of 1932, as amended by Section 501 of the Revenue Act of 1934, advised the taxpayer by registered mail that the determination of its income tax liability for the taxable period July 1, 1933 to November 20, 1933, disclosed a deficiency in tax of $1,498.02 and a penalty of $374.51. Thereafter, on September 1, 1937, the taxpayer [33] filed an appeal from said notice of deficiency with the United States Board of Tax Appeals. The Commissioner having

filed on October 12, 1937 a motion to dismiss the petition for noncompliance with the Rules of the Board of Tax Appeals, the taxpayer on November 1, 1937, filed an amended petition. The Commissioner filed his answer to the amended petitio on November 17, 1937.

The case was called for hearing before a Division of the Board of Tax Appeals at Seattle, Washington, on September 29, 1938, and upon motion was consolidated for hearing and decision with the cases of Marlborough House, Inc., v. Commissioner, B. T. A. Docket Nos. 90487 and 90452, a successor corporation of the taxpayer. On November 9, 1939, the Board of Tax Appeals promulgated its consolidated findings of fact and opinion, and on February 26, 1940, entered its decision, finding a deficiency in income tax for the taxable period July 1, 1933 to November 20, 1933 in the amount of $136.45 and a penalty for said period in the amount of $34.11.

III.

NATURE OF CONTROVERSY

Under date of May 20, 1927, the Marlborough Investment Co., a corporation, issued its bonds in the aggregate principal sum of $500,000.00, and to secure them executed a mortgage or deed of trust on certain real and personal property located in Seattle, Washington, being an apartment building known as the "Marlborough House," together with the personal property situated therein, all of which it then owned. [34] Default in the payment of

these bonds occurred May 10, 1932, at which time the amount of outstanding bonds was $453,900.00.

Shortly after the default a bondholders' committee was organized, consisting of William D. Perkins, W. O. Bulette, and Harvey Lantz, and a written "Deposit Agreement" was executed by the above three persons constituting the committee, in which the National Bank of Commerce of Seattle was designated as depository.

Bonds were deposited under the deposit agreement to the extent of more than 97 percent of the whole. The holders of $441,100.00 of par value bonds came in under the deposit agreement, deposited their bonds thereunder, and authorized the bondholders' committee to act for them. The holders of $12,800.00 par value of bonds failed to deposit.

Under date of August 15, 1932, the bondholders' committee in writing requested the National Bank of Commerce of Seattle, the trustee under the trust deed and mortgage, to commence foreclosure proceedings because of the existing defaults in payments, and it did so on August 26, 1932.

While the foreclosure proceedings were pending, a written stipulation was entered into between certain of the defendants in the action and the trustee bank, as plaintiff, under date of July 1, 1933, by which the parties consented to the entry of a decree of foreclosure, and by the further terms of which the record owners of the property, i. e., State Developers, Inc., a corporation, and Russell L.

Cooley and Lillian A. Cooley, his wife, each executed and delivered a quitclaim deed to all the property in question in consideration of the payment [35] of the sum of $10,025.00 cash. In these deeds the name of the grantee was left blank.

The stipulation specifically authorized the plaintiff and/or its attorneys to insert the name of the grantee in the deeds. On September 28, 1938, the attorneys for the plaintiff, acting under the written authority conferred in the stipulation, filled in the name of Russell C. Perkins, trustee for the bondholders' committee, as grantee in each of the deeds and on the same day Perkins, as trustee, executed and delivered a quitclaim deed covering all the property to Marlborough House, Inc., (the taxpayer in the consolidated proceedings before the Board in Dockets Nos. 90487 and 90452) a corporation, which was organized by the bondholders on or about November 10, 1933, to take over and manage the property acquired by the bondholders at the foreclosure sale.

By the stipulation, the defendants further agreed to turn over to the plaintiff or its nominees, on July 1, 1933, the possession of the real and personal property involved. The bondholders' committee put up the money for the purchase of the property from the record owners and was made the nominee of the plaintiff, to whom the possession of the property was turned over.

The committee appointed Russell C. Perkins its agent to collect the rents and pay the expenses of

the general management of the building and to take physical possession of the building for the committee. [36] Perkins, on the first day of July 1933, took physical possession of the property, and thereafter, until November 20, 1933, managed the property, collected the rents, and paid the expenses for the committee.

After the passing of title to this property from State Developers, Inc., and Russell L. Cooley and wife by the quitclaim deeds dated July 1, 1933, the foreclosure action was prosecuted to judgment and sale. The judgment and decree of foreclosure was entered in accordance with the stipulation and on the same date as the stipulation. The sheriff's foreclosure sale was held on the 30th day of September 1933; and the bondholders' committee was the successful bidder and purchaser. The sale was thereafter duly confirmed by the Superior Court having jurisdiction of the matter and thereafter the sheriff's certificate of purchase covering the property was made out to the bondholders' committee and was duly assigned by the committee on the back page thereof to Marlborough House, Inc. After the year of redemption had gone by and the property had not been redeemed the sheriff's deed to the property was issued directly to Marlborough House, Inc., assignee of the bondholders' committee.

The bid price at the sheriff's sale submitted by the bondholders' committee was $340,425.00. This bid was accepted and the property was sold to the bondholders' committee. The purchase price was

paid mainly by a surrender of the deposited bonds, the remainder by cash. The total amount of the bonds deposited with the sheriff to apply upon the purchase price of the real and personal property was $441,100.00. The [37] holders of the non-deposited bonds were paid in cash their proportion of the purchase price after deducting their pro rata cost and expense of the foreclosure, which resulted in a payment to them of 73.58 percent of the face value of their bonds.

Marlborough House, Inc., after it was organized and took possession of the property, issued all of its stock to the bondholders of the Marlborough Investment Co. who had deposited their bonds with the committee.

Bondholders Committee, the taxpayer herein, did not file an income tax return for any period. Marlborough House, Inc., the taxpayer in Docket Nos. 90487 and 90452, at the time of filing its first return, included figures of gross income and deductions for the period between July 1 and December 31, 1933, which period covers the period of existence of the bondholders' committee and the first period of existence within the year 1933 of the corporation.

In the audit of the return for 1933, the Commissioner determined that the Bondholders Committee was an association taxable as a corporation for the period July 1, 1933 to November 20, 1933, under the provisions of Section 1111(a)(2) of the Revenue Act of 1932 (Articles 1312 & 1314, Regulations 77), and the Board of Tax Appeals sustained the Com-

missioner. In determining the amount of depreciation allowable for the said period on the property known as the "Marlborough House," the Commissioner computed the depreciation on the cost or price bid and paid for it at the foreclosure sale allocated to the physical depreciable assets, to-wit, $288,620.54 for the building and $43,827.57 for furniture and equipment, and allowed depreciation [38] in the amount of $940.29 for the period held by the taxpayer subsequent to acquisition on September 30, 1933.

The Board of Tax Appeals sustained the contention of the taxpayer that the above-described transactions constituted a "reorganization" within the meaning of Sections 112(a)(3) and 112(i) of the Revenue Act of 1932, and that the Marlborough House, Inc., was organized and the property known as the Marlborough House was transferred thereto by the Marlborough Investment Co., pursuant to a plan of reorganization, and that the basis upon which depreciation is allowable in respect to the property bid in at the foreclosure sale is the basis for depreciation in the hands of the predecessor corporation, the Marlborough Investment Co., less the depreciation already taken by such corporation (based on a 30-year remaining life of the building from July 1, 1933, instead of a remaining life of 45 years, as determined by the Commissioner).

Based upon the Board's determination, the taxpayer herein is allowed additional depreciation in

the amount of $9,902.32 for the taxable period involved.

The Commissioner presents that the taxpayer, the Bondholders Committee, did not acquire the property of the predecessor owner in connection with a statutory reorganization but at a foreclosure sale, and that the basis for computing depreciation of the property in the hands of the taxpayer herein is the cost basis of the said property as of September 30, 1933, and that the cost is represented by the price bid and paid at the foreclosure sale by the taxpayer. (The Commissioner [39] concedes that the remaining life of the building is 30 years, as determined by the Board.) The Commissioner also concedes that whatever basis is applicable to the Bondholders Committee is the basis applicable to the Marlborough House, Inc., (its successor).

Inasmuch as the taxpayer filed no return for its taxable period, the Commissioner asserted the mandatory 25% penalty provided for by Section 291 of the Revenue Act of 1932, which the Board found was properly asserted. Since the Board's determination reduced the proposed deficiency, the amount of penalty was proportionately reduced. The Commissioner further presents that the amount of 25% penalty determined by the Board is understated.

IV.

ASSIGNMENTS OF ERROR

That the Commissioner of Internal Revenue, being aggrieved by the opinion and decision of the United

States Board of Tax Appeals in this proceeding, hereby petitions for a review of said opinion and decision by the United States Circuit Court of Appeals for the Ninth Circuit, and for the correction of the manifest errors which therein occurred, and intervened to his prejudice. The errors committed by the Board, which are relied upon by the Commissioner as the basis of this petition for review, are as follows:

(1) The Board erred in holding and deciding that the taxpayer acquired the assets and property (known as the "Marlborough House") from the predecessor owner in connection with a "reorganization", as that term is defined in Sections 112(a)(3) and 112(i) of the Revenue Act of 1932.

[40]

(2) The Board erred in failing to hold and find that the taxpayer did not acquire the assets and property (known as the "Marlborough House") from the predecessor owner in connection with a "reorganization", as that term is defined in Sections 112(a)(3) and 112(i) of the Revenue Act of 1932.

(3) The Board erred in holding and deciding that the acquisition by the taxpayer of assets and property (known as the "Marlborough House") from the predecessor owner was pursuant to a plan of "reorganization".

(4) The Board erred in failing to hold and decide that there was not such a continuity of interest in the property and assets of the predecessor owner,

as is contemplated by the provisions of Section 112(i)(1) of the Revenue Act of 1932.

(5) The Board erred in holding and deciding that the taxpayer's basis for computing depreciation on the assets and property (known as the "Marlborough House") acquired from the predecessor owner is the cost or basis of the said assets and property in the hands of the Marlborough House, Inc., (less depreciation already taken by such corporation).

(6) The Board erred in failing to hold and decide that the taxpayer's basis for computing depreciation on the assets and property (known as the "Marlborough House") acquired from the predecessor owner is their cost to the taxpayer, which is the price bid and paid at the foreclosure sale on September 30, 1933.

(7) The Board erred in ordering and deciding that there is a deficiency in income tax due from the taxpayer for the taxable period July 1, 1933 to November 20, 1933, only in the amount of $136.45 and a penalty for said period only in the amount of $34.11. [41]

(8) The Board erred in failing to order and decide that there are deficiencies in income tax and penalty due from the taxpayer for the taxable period July 1, 1933 to November 20, 1933 in the respective amounts of $1,498.02 and $374.51.

(9) The Board erred in that its opinion and decision are contrary to the law and the evidence.

Wherefore, the Commissioner petitions that said

findings of fact and opinion and decision of the United States Board of Tax Appeals be reviewed by the Circuit Court of Appeals for the Ninth Circuit; that a transcript of the record be prepared in accordance with the law and the rules of said court and be transmitted to the Clerk of said court for filing, and that appropriate action be taken to the end that the errors herein complained of may be reviewed and corrected by said court.

(Signed) SAMUEL O. CLARK, JR.
Assistant Attorney General.

(Signed) J. P. WENCHEL,
RLW
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:
CLAUDE R. MARSHALL,
Special Attorney,
Bureau of Internal Revenue.
CRM/csl
4/30/40 [42]

United States of America,
District of Columbia—ss.

Claude R. Marshall, being duly sworn, says that he is a Special Attorney in the Bureau of Internal Revenue, and as such is duly authorized to verify the foregoing petition for review; that he has read said petition and is familiar with the contents thereof; that said petition is true of his own knowledge

except as to the matter therein alleged on information and belief, and as to these matters he believes it to be true.

(Signed) CLAUDE R. MARSHALL,

Sworn and subscribed to before me this 1st day of May, 1940.

(Signed) GEORGE W. KREIS,
Notary Public.

My commission expires November 15, 1942.

[Endorsed]: U. S. B. T. A. Filed May 13, 1940.

[43]

In the United States Circuit Court of Appeals
For the Ninth Circuit

[Title of Cause.]

NOTICE OF FILING PETITION FOR REVIEW

To: Harold L. Scott, C.P.A.,
500 Insurance Building,
Seattle, Washington.

You are hereby notified that the Commissioner of Internal Revenue did, on the 13th day of May, 1940, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit, of the decision of the Board heretofore rendered in the above-

entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 13th day of May, 1940.

(Signed) J. P. WENCHEL,
RLW
Chief Counsel,
Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 18 day of May, 1940.

HAROLD L. SCOTT,
Attorney for Respondent on Review.

5/2/40 [44]

[Endorsed]: U.S.B.T.A. Filed May 22, 1940.
CRM/csl

In the United States Circuit Court of Appeals
for the Ninth Circuit

[Title of Cause.]

NOTICE OF FILING PETITION FOR REVIEW

To: T. H. Lovell, Member of
Bondholders Committee for
Marlborough Investment Co.,
500 Insurance Building, Seattle, Washington.

You are hereby notified that the Commissioner of Internal Revenue did, on the 13th day of May, 1940, file with the Clerk of the United States Board of

Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 13th day of May, 1940.

(Signed) J. P. WENCHEL
RLW
Chief Counsel,
Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 16 day of May, 1940.

Sgd T. H. LOVELL
For Respondent on Review.

CRM/csl
5/2/40

[Endorsed]: U.S.B.T.A. Filed May 22, 1940. [45]

In the United States Circuit Court of Appeals
for the Ninth Circuit

[Title of Cause.]

NOTICE OF FILING PETITION FOR REVIEW

To: William Z. Kerr, Esq.,
309 Hoge Building,
Seattle, Washington.

You are hereby notified that the Commissioner of

Internal Revenue did, on the 13th day of May, 1940, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 13th day of May, 1940.

(Signed) J. P. WENCHEL
RLW
Chief Counsel,
Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 15 day of May, 1940.

Sgd W. Z. KERR
Attorney for Respondent on Review.

CRM/csl
5/2/40

[Endorsed]: U.S.B.T.A. Filed May 22, 1940. [46]

In the United States Circuit Court of Appeals
for the Ninth Circuit

[Title of Cause.]

STATEMENT OF POINTS

Comes Now the Petitioner on Review herein and makes this concise Statement of Points on which he intends to rely on the review herein, to-wit:

1. The Board of Tax Appeals erred in holding and deciding that the taxpayer acquired the assets and property (known as the "Marlborough House") from the predecessor owner in connection with a "reorganization," as that term is defined in Sections 112(a)(3) and 112(i) of the Revenue Act of 1932.

2. The Board of Tax Appeals erred in failing to hold and find that the taxpayer did not acquire the assets and property (known as the "Marlborough House") from the predecessor owner in connection with a "reorganization," as that term is defined in Sections 112(a)(3) and 112(i) of the Revenue Act of 1932.

3. The Board of Tax Appeals erred in holding and deciding that the acquisition by the taxpayer of assets and property (known as the "Marlborough House") from the predecessor owner was pursuant to a plan of "reorganization". [47]

4. The Board of Tax Appeals erred in failing to hold and decide that there was not such a continuity of interest in the property and assets of the

predecessor owner, as is contemplated by the provisions of Section 112(i)(1) of the Revenue Act of 1932.

5. The Board of Tax Appeals erred in holding and deciding that the taxpayer's basis for computing depreciation on the assets and property (known as the "Marlborough House") acquired from the predecessor owner is the cost or basis of the said assets and property in the hands of the Marlborough Investment Co., (less depreciation already taken by such corporation).

6. The Board of Tax Appeals erred in failing to hold and decide that the taxpayer's basis for computing depreciation on the assets and property (known as the "Marlborough House") acquired from the predecessor owner is their cost to the taxpayer, which is the price bid and paid at the foreclosure sale on September 30, 1933.

7. The Board of Tax Appeals erred in ordering and deciding that there is a deficiency in income tax due from the taxpayer for the taxable period July 1, 1933 to November 20, 1933, only in the amount of $136.45 and a penalty for said period only in the amount of $34.11.

8. The Board of Tax Appeals erred in failing to order and decide that there are deficiencies in income tax and penalty due from the taxpayer for the taxable period July 1, 1933 to November 20, 1933 in the respective amounts of $1,498.02 and $374.51.

9. The Board of Tax Appeals erred in that its

opinion and decision are contrary to the law and the evidence.

J. P. WENCHEL
W
Chief Counsel,
Bureau of Internal Revenue.

6/10/40
CRM/csl [48]

Service of a copy of the within Statement of Points to be relied on is hereby admitted this 1 day of July, 1940.

W. Z. KERR
Attorney for Respondent on Review.

CRM/csl 6/10/40

[Endorsed]: U.S.B.T.A. Filed Aug. 7, 1940. [49]

In the United States Circuit Court of Appeals for the Ninth Circuit

B. T. A. Docket Nos. 90452 & 90487.

GUY T. HELVERING, Commissioner of Internal Revenue,

Petitioner on Review,

v.

MARLBOROUGH HOUSE, INC.,

Respondent on Review.

B. T. A. Docket No. 90486

GUY T. HELVERING, Commissioner of Internal Revenue;

Petitioner on Review,

v.

BONDHOLDERS COMMITTEE, MARLBOROUGH INVESTMENT CO., FIRST MORTGAGE BONDS,

Respondent on Review.

ORDER

Upon motion of petitioner on review, for cause shown and with consent of respondents on review, it is hereby ordered:

1. That the above-entitled cases shall be consolidated for record, briefing, hearing and decision.

2. That there shall be but one consolidated statement of evidence in the above-entitled causes, which

shall contain all the evidence introduced by all the parties to the above-entitled causes which is material in so far as it relates to the assignments of error by the petitioner on review in his respective petitions for review by this Court of the decisions of the United States Board of Tax Appeals.

3. That the two certified records sur petitions for review shall be made upon designation of portions of record in the usual course and that a complete transcript of record be filed only in the case of Guy T. Helvering, [50] Commissioner of Internal Revenue, v. Bondholders Committee, Marlborough Investment Co., First Mortgage Bonds, BTA-Docket No. 90486, which shall include the aforesaid consolidated statement of evidence, and an abbreviated record be filed in the remaining cause, entitled Guy T. Helvering, Commissioner of Internal Revenue, v. Marlborough House, Inc., BTA.-Docket Nos. 90452 and 90487, which consolidated record shall be printed under one cover.

4. That there shall be no duplication of documents in the consolidated record as printed, and that all matter printed in the full record in the case of Guy T. Helvering, Commissioner of Internal Revenue, v. Bondholders Committee, et al., BTA-Docket No. 90486, shall be taken and considered for all purposes as forming a part of the printed record in the case of Guy T. Helvering, Commissioner of Internal Revenue, v. Marlborough House, Inc., BTA.-Docket Nos. 90452 and 90457, as fully as if printed therein; and that the abbreviated record

printed in the consolidated record on review shall contain the following documents: Original and Amended Petitions filed with Board of Tax Appeals from the notices of deficiency; answers to amended petitions filed by the Commissioner of Internal Revenue; decisions, petition for review (joint), together with proof of service of notice of filing petition for review and of service of copy of petition for review; and statements of points.

5. That reviews shall be taken and considered as upon a record filed in this Court in each of the above-entitled causes on review and shall have the same force and effect as if a separate record on review had been filed in each of the above-entitled causes.

And It Is Further Ordered that the Clerk of this Court transmit [51] a certified copy of this order to the United States Board of Tax Appeals, to be by him incorporated in the record on review as certified and transmitted to this Court.

CURTIS D. WILBUR
United States Circuit Court Judge.

Dated this 10th day of July, 1940.

[Endorsed]: Filed: July 10, 1940. Paul P. O'Brien, Clerk.

A True Copy.

Attest: July 10, 1940.

[Seal] (s) PAUL P. O'BRIEN,
Clerk

[Endorsed]: U.S.B.T.A. Filed July 15, 1940. [52]

In the United States Circuit Court of Appeals
for the Ninth Circuit

[Title of Board and Causes.]

CONSOLIDATED STATEMENT OF EVIDENCE

The following is a statement of evidence in narrative form in the above-entitled causes. These causes came on for hearing before the Honorable John W. Kern, Member of the United States Board of Tax Appeals, at Seattle, Washington, on September 29, 1938. William Z. Kerr, Esq., appeared for the taxpayers, and Edward C. Adams, Esq., appeared for the Commissioner of Internal Revenue.

Upon motion of counsel for the taxpayers, and without objection, the causes were consolidated for hearing and decision.

Thereupon,

DAVID T. YOUNG

was called as a witness on behalf of the taxpayers, and having been duly sworn, was examined and testified as follows: [53]

Direct Examination

(By Mr. Kerr):

My name is David T. Young, and I have resided in Seattle, for 36 years. I am in the real estate business and I am an independent real estate appraiser, and have been for 35 years.

The Marlborough House is located at 1220 Boren Avenue; it is a concrete, steel and brick apartment

house, containing about 85 apartments and some 250 rooms. It covers about two city blocks and is six or seven stories tall.

Thereupon,

ROBERT W. SPRAGUE,

was called as a witness for the taxpayers, and after being duly sworn, was examined and testified as follows:

Direct Examination

I am vice president and trust officer of the National Bank of Commerce of Seattle. I have been in the trust department since in 1928. Before that I was trust officer in the Marine National Bank of Seattle.

The National Bank of Commerce was the trustee of the Marlborough Investment Company bond issue of May 20, 1927, which was a $500,000 issue. I was in charge of the trust department at the time these bonds defaulted on May 10, 1932. There were $453,900 of bonds outstanding at that time. Shortly after the default, a bondholders' committee was organized. A depositary was provided for in the agreement, and the National Bank of Commerce of Seattle was the depositary.

The instrument you hand me is an agreement called a "deposit agreement" with reference to the deposit of Marlborough bonds, signed by W. O. Bulette, Harvey Lantz, William D. Perkins. The bank accepted the agreement to become a depositary

(Testimony of Robert W. Sprague.)

on May 27, 1932, and it is signed by myself as vice president. [54]

The said "deposit agreement" was offered and received in evidence, and marked Petitioners' Exhibit No. 1, a copy of which is attached hereto and made a part hereof.

Witness continuing: I don't think I knew Mr. Bulette. I knew Mr. William D. Perkins; he died in 1936 I believe. I don't know whether Professor Lantz is still alive.

The instrument you hand me is a letter dated August 15, 1932, addressed to the National Bank of Commerce, signed by William D. Perkins, W. O. Bulette, and Harvey Lantz, Marlborough House Bondholders' Committee, which I received.

The letter was offered and admitted in evidence, and marked Petitioners' Exhibit No. 2, a copy of which is attached hereto and made a part hereof.

Suit was instituted by the trustee pursuant to the request in the letter. The suit was filed August 26, 1932.

Thereupon, the following documents were offered and received in evidence, and marked as petitioners' exhibits:

Petitioners' Exhibit No. 3—A certified copy of a deed from the Real Estate Improvement Company to the Marlborough Investment Company, dated May 10, 1927.

Mr. Kerr thereupon explained that the purpose of this exhibit (Petitioners' Exhibit No. 3) is to

evidence the title in the Marlborough Investment Company at the time the trust deed was executed in the form it is disposed of.

Petitioners' Exhibit No. 4—Original trust deed dated May 20, 1927, or mortgage to secure the bond issue of the Marlborough Investment Company.

Petitioners' Exhibit No. 5—A deed of conveyance, dated December 31, 1928, and bill of sale from the Marlborough Investment Company to the F. S. Stimson Company which conveys the property subject to the $500,000 mortgage. [55]

Petitioners' Exhibit No. 6—A certified copy of the recording for a change of name from the F. S. Stimson Company to the name of Stimson-Moore Company, dated May 20, 1931.

Petitioners' Exhibit No. 7—A deed and bill of sale from Stimson-Moore Company to Gardner J. Gwinn, Inc., a corporation, dated June 3, 1931, also mentioning the mortgage.

Petitioners' Exhibit No. 8—Statutory warranty deed of Gardner J. Gwinn, Inc., to State Developers, Inc., a Washington corporation, dated February 26, 1932.

Petitioners' Exhibit No. 9—A conveyance from the State Developers, Inc., to a half interest in the property to Russell L. Cooley, dated May 13, 1932.

Petitioners' Exhibit No. 10—Original lis pendens filed August 26, 1932, starting foreclosure.

Petitioners' Exhibit No. 11—Certified copy of stipulation of entry of judgment, dated July 1, 1933.

Petitioners' Exhibit No. 12—Certified copy of decree of foreclosure, dated July 1, 1933.

Petitioners' Exhibit No. 13—Order confirming the sheriff's sale, dated October 16, 1933.

A copy of each of the aforesaid documents is attached hereto and made a part hereof.

Thereupon,

ROBERT W. SPRAGUE

was recalled to the stand, was further examined and testified as follows:

Direct Examination
(Resumed)

(By Mr. Kerr):

The witness was handed and identified a signature card, dated July 10, 1933, of the National Bank of Commerce entitled Marlborough House and a letter accompanying it, and further testified:

Both are from the records of the bank, and the letter was received by the bank. [56]

Thereupon, the said documents—signature card and letter—were offered and received in evidence as Petitioners' Exhibit No. 14, and made a part of the record. A copy of each document is attached hereto and made a part hereof.

(Testimony of Robert W. Sprague.)

I know that the State Developers and Mr. Cooley who were the then record owners of the title delivered possession, but I could not say as to the date—about the time the decree was entered on July 1, 1933, I would say. The bank as trustee did not have possession of the property from that time to the organization of the Marlborough House as a corporation.

I had conferences with the committee or some of its members on or about September 30, 1933, with reference to the bid price that was to be made at the sheriff's sale. The substance of those conversations was: We had to arrive at some conclusion as to what should be bid in at the sale, and it was finally decided to bid in an amount which would give the bondholders 73.58 cents on the dollar as I recall. The amount was arrived at by trying to strike a sort of a balance that the bondholders who had deposited their bonds would not be too badly hurt if the property was redeemed in an effort to give them a fair value for their bonds if the bonds were redeemed or the property was redeemed, plus the amount of cash available to take care of non-depositing bondholders. Both factors would have come into it. I don't know approximately how much was available to take care of the non-depositing bondholders at the time. The trustee did not at that time make an independent appraisal or any appraisal of the physical properties of the Marlborough Hotel that were under the mortgage.

(Testiniony of Robert W. Sprague.)

The bid had no reference to the physical value of the securities under the mortgage; I think that the bid was solely based upon the interest of the [57] bondholders.

I mean by "the interest of the bondholders" that if, there was a redemption of the property and the amount of the judgment paid in, the bondholders who had deposited would not suffer too great a loss on their bonds. I wasn't personally present at the foreclosure sale. I do not know whether there were any other bidders at the sale except the bondholders' committee—I think not.

Cross Examination

(By Mr. Adams):

I do not know whether there were other bidders; I was not present. As I recall it, this 73.58% was figured—well, if the bondholders could get that much on their bonds, why, that would be a pretty good settlement for them.

Q. You don't know of your own knowledge why that figure was reached, do you?

A. As I have stated.

Q. You don't know what the components were that went into making up that figure then, do you?

A. As I have stated—that is, the desire to get an amount that would be fair to depositing bondholders if the property was redeemed, plus the amount of cash they might have had available or could secure.

(Testimony of Robert W. Sprague.)

Q. Then, it is your thought, is it, that if the property was redeemed, they would have received about 73 cents on the dollar?

A. Yes, 73.58 on the dollar.

I know whether or not there was any thought of a possibility of redemption at that time in those discussions, because there was always a possibility. I don't recall that there was anything definitely said by any of the parties to those discussions that it was anticipated that somebody would redeem, but I do recall the question of the possibility of redemption.

The amount we were going to pay the non-conforming bondholders had something to do with the determination of this 73.58%, because it didn't [58] seem fair to give them a hundred cents on the dollar, I recall that, and so you have to figure as I said in the first place a sort of a balance that you wouldn't overpay the non-depositing bondholders or underpay depositing bondholders if the property was redeemed.

I don't believe I am in a position to say what the value of the property was at that time. I was one of the trust officers of the bank. I was interested in this transaction purely as trustee for the bondholders who were represented by the bondholders' committee.

Q. Did you help with the negotiations that arrived at this 73.58%?

A. There was a discussion of that matter as I recall.

Thereupon,

WILSON O. BULETTE

was called as a witness for the taxpayer, and having been duly sworn, was examined and testified as follows:

Direct Examination

(By Mr. Kerr):

I purchased some of the Marlborough House bonds in 1928. At one time I held $14,000 worth. I was one of the members of the protective committee that was formed. The other members of the committee were Mr. Lantz, Mr. Perkins and myself. Mr. Lantz and Mr. Perkins are now dead. The purpose of the organization of the committee was to clear up the muddle we were in. The purpose of the finance committee was, as I see it, to get the bondholders in as good a shape as we could in as short a time as we could. The Committee had quite a few meetings. I gave instructions to the bank to foreclose the mortgage. As I understand it, we had the money on hand to buy the equity or interest of the State Developers and Russell Cooley on July 1, 1933.

We had a meeting after July 1, and just before the sheriff's sale to [59] determine the amount of money we had on hand. Mr. Perkins and I made computations to arrive at the amount we intended to bid at the sheriff's sale, and we arrived at that according to the amount of money on hand. What I mean by that is: We had, as near as I can remem-

(Testimony of Wilson O. Bulette.)

ber, somewhere around $23,000 on hand at that time.

I think there were about three bondholders that had not come into the agreement holding about $12,000 worth of bonds. We had costs and expenses of the foreclosure to pay.

Q. Now, at that time did you discuss with Mr. Perkins and the committee and the bank or any of them just the basis of your bid with reference to the physical values of the property?

A. Well, we didn't want to borrow any money and it was just determined by the amount of money we had on hand at the time.

Q. You mean by that that you had to pay cash to the non-conforming bondholders.

A. Yes.

Q. And you gauged the amount of the bid by the amount of cash that was available for that purpose? A. Yes.

Q. Is that the intent of your testimony?

A. Yes, it is.

I don't just remember whether the bondholders' committee was in the physical possession of the Marlborough House immediately after July 1, 1933, collecting the rent and making the disbursements as a committee—it was right about that time. I don't just remember the exact date. I do know it was the bondholders' committee that was managing, collecting the rents and making the disbursements about

(Testimony of Wilson O. Bulette.)

that time. The bondholders' committee was reorganized as far as I know when the Marlborough House, Inc., was formed in November, 1933. [60]

As far as I know there was no sale for anything prior to the time the Marlborough House, Inc., was organized.

(No Cross-Examination)

Thereupon,

RUSSELL C. PERKINS,

was called as a witness for the taxpayers, and having been duly sworn, was examined and testified as follows:

(By Mr. Kerr):

I am the son of William D. Perkins. I was employed by William D. Perkins and Company about eight years before my father's death. My father was engaged in investment business—banking investment. He financed and sold bonds such as the "Marlborough House bonds", I was an officer of his company—secretary-treasurer. I was with him at the time of the default of the Marlborough bonds at the time of the foreclosure. I am one of the executors of his estate and I am conducting the business of William Perkins and Company now. I am the Russell Perkins referred to in the Petitioners' Exhibit No. 14, and that is my signature on

(Testimony of Russell C. Perkins.)

the signature card. We started as agent to collect the rents for the Marlborough House on July 1, 1933. July 1, 1933 was Saturday, and I went up around noon with one of the officers of the trust department of the National Bank of Commerce to the Marlborough House and interviewed the house manager, Mrs. Bishop, who is still there as manager. We instructed her at that time that she would report to me and she would hand over the money for rental to me, and from that time on I took in the money she collected and still do, and also make the disbursements.

That is. my father's signature on those three checks you show me, dated July 1, 1933. Mr. Kerr then explained: [61]

"There three checks, your Honor, amount to $10,025. One is to the State Developers for $5,000; the other $4,975 to Mr. Cooley; the other is $50 to E. S. McCord, my partner, who had charge of the matter at this time. Technically, I can't show just why that check for $50 was given Mr. McCord. Mr. McCord is in the East, and I didn't realize it until the check came in, but that is the $10,025 that was paid to secure the State Developers' interest."

Thereupon, the three checks, dated July 1, 1933, were offered by the taxpayers and received in evidence and marked Petitioners' Exhibit No. 15, and made a part of the record. A copy of each check is attached hereto and made a part hereof.

(Testimony of Russell C. Perkins.)

Witness continuing: William D. Perkins and Company is the payee on the note. It is the note of the bondholders' committee and is signed by William D. Perkins and T. H. Lovel. Mr. Lovel succeeded Professor Lantz as one of the members of the committee. The committee had no money of its own, and the note was given for money William D. Perkins Company loaned to the committee to take care of this obligation.

I was not a member of the bondholder's committee.

The witness was handed a deed and he identified his signature thereon. Mr. Kerr then proposed to offer the document which he stated was a quitclaim deed from Russell Perkins to the Marlborough House, which was prepared [62] the day before in his office to complete the conveyance from Perkins as trustee to the corporation, the taxpayer herein.

"Mr. Adams: If your Honor please, that is objected to as a paper prepared just yesterday (September 28, 1938) in preparation for the trial of this case, which will not change the title or the title to real estate, as I understand it. The title of this property, wherever it may have been at the times herein involved, in the years 1933 and 1934, without regard to the paper that was prepared yesterday by statement of counsel.

(Testimony of Russell C. Perkins.)

"I don't see where this paper has any bearing on the title to the property back in 1933 and 1934.

"Mr. Kerr: Well, that is a question of law, it seems to me, your Honor. The law of the State of Washington is well settled that if a deed is delivered in blank to an individual with either written or oral authority to fill in the grantee's name, that the equitable title is immediately conveyed and the legal title is conveyed at the time the blank is filled out. I have the cases to sustain that, and I will put it in.

"The Member: Without going into legal argument, I will admit it in evidence.

(Document, quit-claim deed, so offered and received in evidence, was marked Petitioners' Exhibit No. 18, and made a part of this record.)

"Mr. Adams: Exception.

The Member: The exception will be admitted.

Mr. Adams: May it be understood that the cross-examination as to this Exhibit 18, does not remove any objection as to its being placed in evidence?"

A copy of this document is attached hereto and made a part hereof.

Cross-Examination

(By Mr. Adams):

I did not have anything to do with the making

(Testimony of Russell C. Perkins.)

of this quit-claim deed (Petitioners' Exhibit No. 18) that bears my signature. It was made in the office of Kerr, McCord and Carey. I know very little about it other than that I was asked to sign it, I did not know that the preceding deeds were in blank. I do not know when the names were inserted in the preceding [63] deeds. I signed this deed yesterday (September 28, 1938) at the office of counsel for the taxpayers. I know nothing more about it than that. I don't think I have ever in my personal or fiduciary capacity made claim to this property—as to its being in my name before I made this quit-claim deed.

Thereupon,

ROBERT B. ALBERTSON,

was called as a witness on behalf of the taxpayers, and having been duly sworn, was examined and testified as follows:

Direct Examination

(By Mr. Kerr):

I am an attorney practicing at the Bar in the State of Washington, being employed in the office of Kerr, McCord and Carey, and I was so employed in 1933. I had a portion of the work assigned to me in connection with the foreclosure of the Marlborough Apartment bonds. I have had personal charge of that file since about the time of the be-

(Testimony of Robert B. Albertson.)

ginning; and I worked with E. S. McCord in the organization of the Marlborough House, the Washington corporation, and attended to various details in connection with the foreclosure sale and the organization of the corporation. As I recollect, I attended the foreclosure sale. I just simply don't remember being actually present at the place of the sale, but at that time I was working with Mr. McCord in connection with it, and my best recollection is now that he asked me to attend the sale, and that I did so. I don't recall any other bid being made other than by the Bondholders' committee at the sheriff's sale. I believe the instructions from the sheriff to make the bid to the bondholders' committee were in writing, though I am not certain as to that. [64]

Thereupon, Mr. Kerr made the following statement:

"The stipulation, your Honor, provided for judgment, recited that the Cooleys and the State Developers would deliver to the plaintiff or its attorneys quit-claim deeds to the property with the grantee's name left blank and that the plaintiff and or its attorneys were authorized to insert the name of the grantee in the deed. I hand you Petitioners' Exhibit 17.

"If your Honor please, in reference to these deeds, they have not been filed of record with the King County Auditor. They were in the

(Testimony of Robert B. Albertson.)

files of William D. Perkins and Company, and the grantee's name was left blank until we began to prepare this case for trial. We then discovered that the grantee's name had never been filled in, and acting under the authority of the stipulation, we have filled in the name of Russell C. Perkins as trustee for the bondholders' committee."

Witness continuing: These deeds were in the files of Kerr, McCord and Carey from July 1, 1933 until this time. The blank was filled in and the name of Russell Perkins inserted yesterday (September 28, 1938) in the office of Kerr, McCord and Carey. Mr. Perkins was present at that time and it was done under my instruction.

Thereupon, taxpayers offered in evidence the aforesaid deeds, and over objection of counsel for the Commissioner, were received in evidence and marked Petitioners' Exhibit No. 17, and made a part of the record. A copy of each is attached hereto and made a part hereof.

Thereupon, it was stipulated by and between the parties that the bondholders' committee, the petitioner in Docket No. 90486 did not file an income tax return for any period, but that the Marlborough House, Inc., petitioner in Dockets 90487 and 90452 at the time of filing its first return included figures for the period between July 1, 1933 and December 31, 1933, which period covers a period of the exist-

(Testimony of Robert B. Albertson.)

ence of the bondholders' committee [65] and the first period of existence within the year 1933 of the corporation.

Thereupon

HAROLD L. SCOTT,

was called as a witness for the taxpayers, and was examined and testified as follows:

Direct Examination

I am a certified public accountant, and I was in 1933 and prior to that time.

"Q. What investigation and what did you do in attempting to determine whether the bondholders' committee should make a return?

A. In 1934, Mr. Perkins, W. D. Perkins, requested that we prepare the returns—prepare the return for the Marlborough House, Inc., and we found upon investigation that the corporation was organized in the early part of November, 1933 and that prior to that time a bondholders' committee had received the income from the apartment house and had turned over all of its right, title and interest to the corporation in November.

The question that came to my mind was as to how to file a return for the committee and the corporation. And as I recall it, I made quite an extensive investigation as to determining

(Testimony of Harold L. Scott.)

whether or not the return should be filed as one. In other words, it was a single operation from the time of acquisition of the property in July, and it seems to me, I found a decision whereby the corporation had the right to include this income as its income as long as a clear statement of facts were made and would be entitled to the deductions for the period.

Then, the question was as to the basis of the property which is now before this Board. We filed a return for the corporation, including all of the income from July 1 to December 31, as a corporate return and did not file as a trust joint venture or association of the bondholders' committee. But that was done without any intent of evasion of facts or avoidance or any other means of reducing the tax. I don't believe that there is any difference which will amount to anything in the tax one way or the other."

Thereupon, the taxpayers' counsel offered and there were received in evidence a certified copy of the sheriff's deed, and a certified copy of the certificate with assignment and the assignment by the members of the bond- [66] holders' committe of the certificate of purchase of the Marlborough House, which documents were marked Petitioner's Exhibits, Nos. 19 and 20, respectively, and made a part of the record. A copy of each is attached hereto and made a part hereof.

The foregoing evidence is all of the material evidence adduced at the hearing before the Board of Tax Appeals, and the same is approved by the undersigned, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, as attorney for the Commissioner of Internal Revenue.

J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

The foregoing is all of the material evidence adduced at the hearing before the Board of Tax Appeals, and the same is approved by the undersigned, as attorney for the respondents on review.

W. Z. KERR,
Attorney for Respondents on Review.

[Endorsed]: U.S.B.T.A. Filed Aug. 7, 1940.

CRM/csl
6/6/40 [67]

PETITIONER'S EXHIBIT 1

Trust No. 725

AGREEMENT

For the protection of the Holders of First Mortgage 7% Sinking Fund Gold Bonds of the Marlborough House issued by Marlborough Investment Co., dated May 10, 1927.

DEPOSIT AGREEMENT

This agreement, made and entered this 20th day of May, 1932, by and among W. O. Bulette, Pro-

fessor Harvey Lantz, and Wm. D. Perkins, hereinafter called the Committee, parties of the first part, and such holders of the Marlborough House First Mortgage 7% Sinking Fund Gold Bonds, hereinafter called bonds, of the Marlborough Investment Company, a Washington corporation, hereinafter called the company, issued under a trust deed or mortgage hereinafter called indenture, executed the 17th day of May, 1927 by the company in favor of The National Bank of Commerce of Seattle as trustee, all of such holders being hereafter called depositors, and The National Bank of Commerce of Seattle as depositary, witnesseth:

Whereas, the trust deed and mortgage was recorded on the 20th day of May, 1927, in Volume 1015 of Mortgages, page 45, records of King County, Washington, to secure issue of $500,000.00 of said bonds on the real and personal property described in said indenture; and

Whereas, the company have defaulted and are now in default in their obligations under the indenture; and

Whereas, united action and cooperation on the part of the holders of said bonds is advisable and necessary to protect the security by said indenture afforded and created for the benefit of the holders of said bonds and to enforce and produce payment of interest on the principal of said bonds and to protect the rights and interests of the holders of said bonds in all respects against adverse action by any person, firm or corporation detrimental

thereto, and such united action and cooperation can best be secured through a committee vested with power and authority to act as hereinafter provided; and

Whereas, the committee has consented to represent and act for the depositors as hereinafter set forth;

Now therefore, in consideration of the premises and mutual advantages which will accrue to the depositors, all depositors, each for himself but not for the other or any of them, agree with one another and with the committee as follows:

Article I.

Section 1. The Depositors hereby make, constitute and [68] appoint W. O. Bulette, Professor Harvey Lantz, and Wm. D. Perkins parties of the first part, and their respective successor or successors, as a Committee under this agreement, with all the rights, powers and privileges given to and vested in the Committee by this agreement.

Section 2. The National Bank of Commerce of Seattle is hereby designated as Depositary under and according to the terms of this agreement.

Section 3. Forthwith upon this agreement being signed by the original members of the Committee, and upon an executed original or duplicate being filed with the Depositary, any holder of any of the bonds secured by said indenture may become a party to this agreement by depositing the bonds held by such holder, accompanied by all unpaid interest coupons appertaining thereto, in

bearer form, with the Depositary at its office in Seattle, Washington, within such period of periods of time as the Committee, from time to time, may designate, and receive from the depositary a certificate of deposit or receipt, duly signed by it, in such form as may be fixed by the committee. The action of a holder of bonds in thus becoming a party hereto shall be irrevocable, except as hereinafter provided.

Article II.

Section 1. A certificate of deposit issued hereunder shall be transferable only upon the books of the Depositary by the registered holder thereof in person, or by his duly authorized attorney, upon the surrender of such certificate properly endorsed, whereupon a new certificate will be issued to the transferee. Every transferee of a certificate shall be bound by all the terms and conditions of this agreement with like effect as though he had executed the same. Any transfer of a certificate shall carry with it all rights and benefits in respect thereof, subject, however, to all of the provisions of this agreement. All transferees, as well as the original holders of certificates of deposit, shall be embraced within the term "Depositors" whenever used herein. The Committee and/or Depositary may deem and treat the person in whose name any certificate shall for the time being be registered as the absolute owner thereof for all purposes and shall not be effected by any notice to the contrary.

The Committee may at any time close the transfer books for such period of time as it may designate. Notice to any depositor for any purpose shall be deemed to be sufficiently given if written or printed notice be mailed to such depositor at the address of such depositor appearing on the books of the depositary. No certificate shall be valid until signed by the depositary.

Article III.

Section 1. No rights hereunder shall accrue to any depositor in respect to this agreement unless and until his bonds shall have been fully subjected to the control of the committee [69] by deposit of such bonds with the depositary hereunder. It shall not be necessary for a depositor to sign this agreement to become a party hereto. Any depositor, by the act of depositing his bonds with the depositary, as herein provided, shall by such act thereupon be and become a party to this agreement. The committee may in its discretion fix or limit the period or periods within which holders of bonds may deposit the same hereunder, and the committee, in its discretion, either generally or in special instances, may extend or renew any period so fixed. Holders of bonds not deposited hereunder within the periods fixed therefor will not be entitled to deposit the same or to become parties hereto, or to share in the benefits obtained hereunder, and shall acquire no rights hereunder, except upon obtaining the express consent of the committee, which may or may not be granted in its absolute discretion. The com-

mittee shall have power to make equitable provisions for any lost or destroyed bonds or certificates of deposit.

Article IV.

Section 1. Each and every depositor, by the act of depositing his bonds with the depositary hereunder, does by such act become a party hereto, and does by becoming a party hereto hereby sell, assign, transfer and deliver to the committee, its successors and assigns, absolutely, each and every bond deposited hereunder by him and all his right, title and interest at law or in equity in and to the same, and also his right, title, interest, property and claim at law or in equity in and to all the assets of the company, whether mortgaged, to secure said bonds or otherwise, and any and all his claims against the company or against any receiver or receivers of the company, or any of their property.

Section 2. Each depositor hereby covenants and agrees with the committee that he will at any time upon request of the committee promptly execute and deliver to the committee any and all assignments, powers of attorney or other instruments which may, in the opinion of the committee, be necessary or proper to effectually vest in the committee full and complete ownership of the bonds and coupons and rights as aforesaid. After depositing bonds and coupons hereunder, no separate action shall be taken by the depositor with respect to the bonds and coupons so deposited.

Article V.

Section 1. The depositors, and each of them, hereby severally and irrevocably constitute and appoint the committee, and its successors, as their respective attorneys, agents and trustees for the purpose of carrying out this agreement and any plan which the committee may adopt in the interest of the depositors, and hereby severally confer upon the committee all power and authority to do and perform any and all acts and things which the committee may consider necessary or desirable, as fully to all intents and purposes as the depositors might or could personally do, hereby ratifying and confirming all acts [70] and things that the committee may do or cause to be done. The depositors, and each of them, further severally authorize the committee to exercise with respect to any matter concerning or relating to the company or their assets or claims against the company, and/or any receiver or receivers of the company, or any of their property, each and every right, power and privilege which the depositors, or any of them, could separately or collectively personally exercise, all as in its discretion the committee may believe, directly or indirectly, tends to the ultimate benefit of the depositors.

Section 2. Without derogation from the general powers hereby conferred upon the committee, the committee shall have power and authority to enforce, protect, discharge, collect, sue for, extend or adjust all rights at law or in equity attaching to

said bonds and coupons thereto attached; to transfer any bond or coupon hereunder into its own name or the name or names of its nominees; to declare due and/or to request the trustee under said indenture to declare due the principal of any and all bonds, whether or not the same be deposited hereunder, and to revoke any such declaration; to dismiss and/or request the trustee under said indenture to dismiss, upon terms satisfactory to the committee, any suit or proceeding instituted by the committee and/or said trustee upon said bonds or under said indenture, and/or against the company to waive any default or defaults by the company under the terms of said bonds or the indenture securing the same; to request the trustee under said indenture to make such waivers; to apply for or secure the removal of any trustee and/or the substitution of other trustees under said indenture; to appoint additional depositaries under this agreement, and to remove any depositaries and appoint successors thereto; to purchase or settle at such prices as they deem proper any claims against the company; to pay or cause to be paid taxes and or assessments on the property described in the mortgaged lease; to effect or continue insurance thereon; to borrow or advance money or give guarantees for the purpose of carrying out any plan adopted by the committee for the purpose of protecting the mortgaged property and/or the interests of the depositors, including the payment of taxes and/or assessments on the mortgaged property, costs of

operation of the mortgaged property, or for the purchase of claims against the company, or for the exercise of any power hereby granted to the committee, or for the purpose of making, in the discretion of the committee, advances to the depositors upon deposited bonds and/or coupons or upon certificates of deposit, or for such periods and upon such terms and conditions as the committee may decide; to pledge the deposited bonds and/or coupons as security for loans which the committee may deem necessary or proper for the protection of the mortgaged property and/or the interests of the depositors; to subordinate the lien of the indenture securing the deposited bonds to a new lien upon the mortgaged property for the purpose of borrowing and/or securing funds to protect the mortgaged property and the interests of the depositors; to pledge or sell any deposited bonds or coupons or the avails thereof, or any other property at any time coming into the possession or control of the committee for the payment of any money so borrowed or agreed to be paid or advanced by the committee or for the performance of any [71] other obligation incurred by the committee hereunder, or for the payment of any expenses incurred by the committee hereunder, or for the securing of any guaranty given by the committee; to exchange the deposited bonds and/or coupons, in whole or in part, for other securities or property; to sell, redeem, surrender, pledge or in any manner charge the deposited bonds and/or coupons as part of any plan adopted by the committee for the protection of

the mortgaged property and/or the interests of the depositors; to institute, defend or become parties to, compound, forbear, settle or conduct any legal proceedings at law or in equity; to file or prove with any receiver, court or referee or committee, all or any part of the bonds and/or coupons deposited hereunder; to apply for receivers or the removal of receivers and for the termination of any receivership; to enter into arrangements for decrees or to facilitate or hasten the course of any litigation; to accept and waive notices of every character in legal proceedings or otherwise; to make requests or demands upon the trustee under the indenture securing said bonds; to consent to the issuance of receivers' certificates having priority over deposited bonds and/or coupons; to purchase any such certificates; to make and/or consent to such modifications in the indenture securing the bonds as the committee deems necessary and proper; to take such action as the committee deems necessary and proper to promote or to secure or prevent a sale of the mortgaged property upon foreclosure or otherwise; to prevent, to delay or to adjourn any such sale at its discretion; to bid or refrain from bidding at any such sale; to procure the organization of a new corporation or corporations, or to adopt or use any existing or future corporations; to take, hold, subscribe, pay for or otherwise give value for the securities and obligations of such corporation or corporations; to receive any new securities to be created and to vote upon the stock of any corporation

now or in the future organized as part of any plan adopted by the committee for the protection of the depositors; to employ counsel, accountants, agents and assistants, and to pay the expenses thereof as part of the expenses of the committee, and to incur and discharge any and all expenses which the committee deems necessary and proper in functioning hereunder; to cause a new corporation to be formed to take over and/or acquire the mortgaged property, and to surrender and/or exchange the deposited bonds and/or coupons, in whole or in part, for all or part of the stock of such corporation upon such basis of exchange as the committee may determine.

Article VI.

Section 1. Any property held by the committee at any time may be pledged, transferred, assigned, mortgaged or conveyed by an instrument in writing signed by a majority of the members of the committee, and no purchaser, mortgagee, pledgee or assignee need inquire as to the power and authority of the committee in the premises nor be bound to see to the application by the committee of any funds received by the committee in connection with any such transaction.

Article VII.

Section 1. The depositors, severally and respectively, agree that the committee shall have power to extend the maturities [72] of any bonds deposited hereunder and/or to reduce the rate of interest on such bonds; provided, however, that any such exten-

sion of maturities or reduction in interest rate shall apply to all deposited bonds, and no such extensions of maturities or reduction in interest rate shall be made which does not apply to at least two-thirds in amount of all outstanding bonds.

Section 2. The depositors, severally and respectively, further consent and agree that the committee shall have power to modify, amend, alter or supplement the indenture securing the bonds by supplemental indenture and agreement in such form and containing such terms and provisions as may be approved by the committee.

Article VIII.

Section 1. All payments and consid rations received by the committee from any source whatever shall be distributed by the committee, or under its direction, ratably among the depositors, subject to the right of the committee to use the same in protecting the mortgaged property and/or the rights and interests of the depositors as to the committee may appear for the best interests of the depositors; but the time or times and the manner of all distributions shall be in the sole and absolute discretion of the committee. The committee or the depositary shall have the right to require the certificates of deposit issued hereunder to be presented for indorsement thereon of any amount paid to the holders thereof, and may require the certificates to be surrendered when no further funds or other property remain to be distributed.

Section 2. The costs, expenses and obligations of the committee and the depositary herein up to the date of any distribution of any kind whatsoever shall be and remain a first charge and lien upon the bonds and upon all funds and property of whatever kind and description in the possession and control of the committee hereunder, and may in the discretion of the committee be fully paid out of any such funds or property before the making of any distribution. The members of the committee shall serve without compensation unless the committee shall, either in its own name or in the name of a nominee or of a corporation caused to be organized by the committee, purchase the mortgaged property at foreclosure or other sale, in which event the members of the committee shall be entitled to reasonable compensation for their services performed from and after the time of such sale, and such compensation shall likewise be a charge and lien upon the bonds and other property of the committee to the same extent as expenses and obligations of the committee.

Article IX.

Section 1. The committee may add to its number by electing an additional member or members of the committee, and may fill all vacancies occurring by death, resignation or otherwise among the committee, and all additional, substitute or successor members of the committee so elected or appointed, upon subscrib- [73] ing to this agreement shall possess and exercise all the powers and duties herein con-

ferred upon the committee as originally constituted as fully and in every respect as if they had been originally named as parties of the first part thereto. The committee may act in all matters by the unanimous action of the committee expressed in writing, signed by it without a meeting, or by and through a majority of its members, in person or by proxy, telegram or letter, at meetings duly held and the act and deed of such majority, either in person or by proxy, telegram or letter, shall in all respects be binding and conclusive as the act and deed of the committee. A majority of the members of the committee in person or by proxy shall constitute a quorum. Any member of the committee may act by proxy at any meeting of the committee, and in consenting in writing to any action and such proxy may or may not be another member of the committee. Any member of the committee may resign by sending his written resignation to the others, and the other members may settle any account or transaction with such resigning member and give full release and discharge hereunder upon such resignation. The committee may act through any agents or representatives and may delegate any authority as well as discretion to any such agents or representatives. Any officer of the depositary or any of the members of the committee may be or may become pecuniarily interested in any bonds, coupons or other claim of property or matters which this agreement concerns, including participation in or under any contract (with the committee or otherwise).

syndicate or organization, whether or not mentioned in this agreement. The depositary shall act in accordance with the direction of the committee or a majority thereof and any direction in writing given by the committee or a majority thereof shall be full and absolute warrant and acquittance to the depositary for compliance therewith.

Article X.

Section 1. The obligations and agreements of the committee as such shall not be binding upon the members personally but shall bind solely the assets in the hands of the committee from time to time. None of the members of the committee nor any depositary acting hereunder shall be personally liable for any act or omission of any agent or employe selected in good faith, or for any error of judgment or mistake of law or of fact, nor for any act or omission done or made by any of them in good faith, nor in any case, except for his, its, or their own individual wilful malfeasance or neglect, and none of the members of the committee shall in any case be personally liable for any of the obligations of the committee, or for the act or omission of any other member of the committee or of the depositary, nor shall the depositary be liable for the act or default of the committee, or any of its members, or of any of its attorneys, agents or servants. No depositary shall be liable in any manner for the acts or defaults of any other depositary. The committee and its members shall be entitled to full indemnity out

of the assets at any time under the control of the committee for its and their expenses, obligations and liabilities incurred hereunder.

Article XI. [74]

Section 1. The committee in its discretion may at any time decline further to represent any particular depositor while continuing to represent the remaining depositors, in which event a notice of such declination shall be mailed by the committee to the former, and thereupon it shall be the duty of such parties within ten days, to surrender their certificates of deposit duly indorsed, pay their pro rata share of the expenses and obligations of the committee, and receive their bonds or other securities, or the proceeds thereof. After the expiration of ten days from the mailing of such notice, the committee shall have no further obligations towards such depositors whether they surrender the certificates of deposit or not, but such certificate shall thereafter be non-negotiable.

Article XII.

Section 1. The committee shall have power at any time to discontinue acting under this agreement; it may at any time finally abandon the carrying out of any plan, and in any such event the deposited securities or the proceeds thereof, or substitutes therefor, shall be delivered to the holders of certificates of deposit in the amounts representing their respective interests, upon surrender of their respective certificates, properly indorsed, and upon

payment, in case of each depositor, of his pro rata share of the expenses and obligations of the committee.

Article XIII.

Section 1. The committee may construe this agreement, and its construction thereof or action thereunder, in good faith, shall be final and conclusive. It may also supply any defect or omission or reconcile any inconsistencies in such manner as shall be deemed by it necessary or proper to carry out any plan of action properly and effectively.

Article XIV.

Section 1. The acceptance of moneys, new obligations, securities or other benefits hereunder by any depositor shall conclusively and finally estop him, and by a majority in amount of the depositors shall conclusively and finally estop all the depositors from questioning the conformity of such benefits in any particular to any of the provisions of this agreement, and shall fully release and acquit the committee from every and any responsibility, or obligation hereunder to such depositor or all the depositors (as the case may be) with respect to such benefits as accepted and their conformity to the provisions of this agreement.

The committee shall file its account with the depositary after the completion of its labors, and the committee shall not be liable nor be compelled to make any prior or other accounting. Such accounts when so filed shall be final, binding and conclusive

upon all parties having any interest therein, and thereupon the committee and its members shall be fully and [75] finally discharged of and from all liability and accountability hereunder in so far as and as to so much thereof as shall not be specifically contested by the depositors by notice in writing delivered to the committee within thirty (30) days after the filing of such accounts with the depositary; and such accounts when so filed shall be final and conclusive upon all and every depositor other than such depositors so specifically contesting such accounts.

Article XV.

Section 1. The depositary at any time may resign by delivering its written resignation to the committee. Any vacancy caused by such resignation, or by removal by act of the committee as hereinbefore provided, shall be filled by the written designation of the committee. Upon the designation of such new depositary all the bonds, coupons, causes of action, securities or other claims and property or evidences deposited or acquired hereunder which may then be in the possession or the control of the depositary so resigned or removed, shall forthwith be delivered by such depositary to the new depositary designated as aforesaid; and all the provisions of this agreement relating to the original depositary shall thereupon apply to such new depositary. The retiring depositary, upon making the delivery to its successor as aforesaid, shall be free from all liability to any party whatsoever for the future cus-

tody or disposition of such bonds, coupons, causes of action, securities, or other claims and property or evidences thereof. Notices of any designation of a new depositary shall be given by the committee to the depositors in the manner hereinbefore provided for the giving of notices.

Article XVI.

Section 1. Should the committee find it necessary or desirable to secure the consent of the depositors to an amendment of this agreement, it shall give notice thereof to the depositors by mail, which notice shall specifically declare that the failure of any depositor to protest against such proposed amendment, within ten days from the time said notice is mailed, shall be deemed an assent to such proposal and consent thereto. The failure of any depositor to protest against any such proposed amendment, within ten days from the time said notice is mailed, shall be deemed an assent to such proposal and consent thereto. The consent or acquiescence of a majority of said depositors shall be sufficient to effect said amendment. This paragraph shall not be construed as mandatory upon the committee in the exercise of any of the powers by this agreement otherwise conferred upon the committee, nor as a limitation upon such powers.

Article XVII.

Section 1. This agreement and all of its provisions shall bind and benefit the several parties (including the depositors herein), their and each of

their survivors, heirs, administrators, successors and assigns, but shall not be construed to and shall not create any trust or obligation of any character in favor of any person not a party hereto. [76]

It is expressly provided and agreed, however, anything contained herein to the contrary notwithstanding, that the depositors shall not in any event or contingency be individually liable for or in respect of any indebtedness or obligation created or incurred by or through the committee; that nothing herein contained shall be construed to create a partnership between any of the parties hereto.

Article XVIII.

Section 1. The members of the committee, by their signatures to this agreement, signify their consent to accept and exercise such powers and authority (subject to the terms hereof) as may be conferred upon them by the terms and provisions of this agreement. This agreement may be executed in one or more counterparts, and all of such counterparts shall constitute the original agreement. This agreement and all of its terms, and all rights, duties and obligations created by, under or in connection with it, shall be construed under and according to the laws of the State of Washington.

In Witness Whereof, the parties of the first part have hereunto signed their respective names, all as of the day and year herein first written, and the depositors evidence their assent hereto and become

parties hereto by their respective deposits of bonds hereunder.

W. O. BULETTE
HARVEY LANTZ
WM. D. PERKINS

The undersigned, on this 27 day of May, 1932, as party of the third part, agrees to act as depositary hereunder.

THE NATIONAL BANK OF COMMERCE OF SEATTLE
By R. W. SPRAGUE
Vice Pres. [77]

EXHIBIT A.

Certificate of Deposit
For

Marlborough House First Mortgage 7% Sinking Fund Gold Bonds deposited under an agreement dated May....., 1932, by and between the holders of such bonds, parties of the first part, and W. O. Bulette, Professor Harvey Lantz, and Wm. D. Perkins a committee named hereunder, parties of the second part.

National Bank of Commerce

of Seattle as depositary of said committee, under said agreement, hereby certifies that there have been deposited with it under and subject to the terms of said agreement the following Marlborough House First Mortgage 7% Sinking Fund Gold Bonds of the Marlborough Investment Company, a

Washington corporation, described and secured by an indenture of mortgage and deed of trust dated May 10, 1927, to The National Bank of Commerce of Seattle, a corporation, as trustee.

Aggregate Principal Amount—

Bond Numbers—

With coupons of date specified below and subsequent coupons attached—

That ..... is the registered holder of this certificate and is entitled to share in the benefits of said agreement in respect to the bonds so deposited and represented by this certificate and to the rights and interests of a depositary as the same are specified and defined in said deposit agreement, an original of which has been filed with the depositary. The holder by receiving this certificate assents to and accepts said agreement and becomes bound thereby and a party thereto in the same manner and with the same force and effect as if he had executed the same. This certificate and the interest represented hereby are transferable only on the books of the depositary by the registered holder hereof in person or by his duly authorized attorney upon surrender hereof [78] properly endorsed, whereupon a new certificate will be issued to the transferee and any transfer of this certificate shall be bound by all of the terms and conditions of said agreement, with like effect as though he had executed the same. Any transfer of this certificate shall carry with it all rights and benefits in respect

to this certificate and of the bonds and coupons herein mentioned, subject, however, to all of the provisions of said agreement. The depositary may deem and treat the person in whose name this certificate shall for the time being be registered as the absolute owner hereof for all purposes and shall not be affected by any notice to the contrary. This certificate shall not be valid unless signed by said depositary.

THE NATIONAL BANK OF COMMERCE OF SEATTLE,
Depositary
By .....
Its Duly Authorized Officer.

(Form of Assignment)

For Value Received, the undersigned hereby sells, assigns and transfers unto.....

.....

this certificate and all right, title and interest therein and in and to the deposited bonds and coupons therein mentioned, subject to all the terms and conditions of the agreement dated May , 1932, in said certificate mentioned, and does hereby irrevocably constitute and appoint.....

.....attorney to make said transfer upon the books of the depositary, and hereby authorizes said depositary to cancel said certificate

and to issue in place thereof a new certificate or certificates in accordance with this assignment.

Dated.....

In the presence of:.....

.....

Notice: The signature to this assignment must correspond with the name as written upon the face of the Certificate in every particular, without alteration or enlargement or any change whatever. [79]

PETITIONER'S EXHIBIT 2.

Established 1893 Incorporated 1905

WM. D. PERKINS & CO., BANKERS
Investment Securities
Safe Deposit Vaults
Seattle, Washington, August 15th, 1932
Codes—A B A, Montgomery

National Bank of Commerce,
City.

Gentlemen:

We, the undersigned, the Committee appointed by over seventy-five percent of the bond holders of Marlborough House Investment Company's First Mortgage Serial Bonds, hereby authorized you to bring a suit for foreclosure of the property and rentals against the present owners.

Your prompt action in securing a Receiver during the period of foreclosure so as to conserve the

rents, will be much appreciated.

Yours, truly,
WM. D. PERKINS,
W. O. BULETTE,
HARVEY LANTZ,
Marlborough House Bondholders' Committee [80]

PETITIONER'S EXHIBIT 3

Real Estate Improvement Company

To

Marlborough Investment Company

WARRANTY DEED

This indenture made this tenth day of May, in the year of our Lord one thousand nine hundred and twenty seven

Between Real Estate Improvement Company, a corporation, duly organized and existing under and by virtue of the laws of the State of Washington, and duly authorized to do business in the State of Washington, party of the first part and Marlborough Investment Company, a corporation party of the second part;

Witnesseth, that the said party of the first part, for and in consideration of the sum of thirty-five thousand and no/100 dollars ($35,000.00). lawful money of the United States, to it in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, does by these presents,

grant bargain, sell convey and confirm unto the said party of the second part, its successors and assigns, the following described tract, lot or parcel of land situated, lying and being in the County of King, State of Washington, and particularly bounded and described as follows, to-wit:

Lots one (1) and four (4) in Block one hundred sixteen (116) of the plat of A. A. Denny's Broadway [82] Addition to the City of Seattle; Also that portion of Lots two (2) and three (3) in said block one hundred sixteen of the said plat of A. A. Denny's Broadway Addition to the City of Seattle, described as follows, to-wit: Beginning at the northwesterly corner of said Lot two (2); thence southerly along the westerly line of said Lots two (2) and three (3) a distance of one hundred twenty (120) feet to the southwesterly corner of said Lot three (3); thence easterly along the line between said Lot three (3) and Lot six (6) of said Block one hundred sixteen (116) a distance of thirty-two (32) feet; thence northerly and at right angles to the line between said Lots three (3) and six (6) one hundred twenty (120) feet to the northerly line of said Lot two (2); thence westerly thirty-two (32) feet to the point of beginning, being the westerly thirty-two (32) feet of Lots two (2) and three (3) in said Block one hundred sixteen (116)

Together with the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining.

To have and to hold the said premises, with the

tenements, hereditaments and appurtenances, unto the said party of the Second part, its successors and assigns, forever.

And the said party of the first part, and its successors does by these presents covenant, grant and agree to and with the said party of the second part, its successors and assigns, that it, the said party of the first part, and its successors, all and singular the premises hereinabove conveyed described and granted, or mentioned, with the tenements, hereditaments, and appurtenances, unto the said party of the second part, its successors and assigns, and against all and every person or persons whomsoever lawfully claiming or to claim the same, or any part thereof (except all taxes and special assessments of every nature whatsoever that are now a lien upon said property are hereby assumed by the parties of the second part) shall and will warrant and forever defend.

In witness whereof the said party of the first part has caused these presents to be subscribed by its President and its corporate seal to be hereunto affixed and attested by its Secretary the day and year first above written.

(R. E. I. Co. Corp. Seal)

REAL ESTATE IMPROVEMENT COMPANY

By F. F. POWELL

Its Vice President

Attest:

REAL ESTATE IMPROVEMENT COMPANY

By W. G. VISSER

Its Secretary

ate of Washington,
unty of King—ss.

On this 16th day of May, A. D. 1927 before me ersonally appeared F. F. Powell and W. G. Visser, me known to be the Vice President and Secrery of the corporation that executed the within d foregoing instrument and acknowledged the id instrument to be the free and voluntary act d deed of said corporation for the uses and purses therein mentioned, and on oath stated that *was* authorized to execute said instrument and at the seal affixed is the corporate seal of said rporation.

In witness whereof I have hereunto set my hand d affixed my official seal the day and year first ove written.

(E. P. W. Notarial Seal) E. P. WILSON
otary Public in and for the State of Washington, residing at Seattle.

(Com. Ex. June 1, 1929)

Filed for record at request of Wm. D. Perkins Co., May 19, 1927 at 43 min. past 4 P. M.

GEORGE A. GRANT,
County Auditor.

IS P/S [83]

PETITIONER'S EXHIBIT 4

TRUST DEED OR MORTGAGE

This Indenture, made and entered into this tenth ay of May, A. D. 1927, by and between the under-

signed, Marlborough Investment Co., a Washington corporation, of Seattle, King County, Washington, hereinafter called the Mortgagor, party of the first part, and The National Bank of Commerce of Seattle, Seattle, Washington, a corporation organized under the laws of the United States of America, hereinafter called the "Trustee" and Mortgagee, party of the second part,

Witnesseth, that whereas, the Mortgagor is the owner of the real property hereinafter mentioned, set forth and described, and is desirous of erecting and constructing a building thereon, and for that purpose of borrowing money and therefor making and issuing first mortgage bonds in the aggregate sum of Five Hundred Thousand Dollars, ($500,000), said bonds to be of the form, tenor and effect as hereinafter set forth, and

Whereas, said bonds are to be Seven Hundred and forty-eight (748) in number, and numbered from One (1) to Seven Hundred and Forty-eight (748), both numbers inclusive, in denominations of One Hundred Dollars, ($100), Five Hundred Dollars, ($500), and One Thousand Dollars, ($1000), each, and aggregating the sum of Five Hundred Thousand Dollars, ($500,000); said bonds to bear interest at the rate of Seven (7) percent per annum from their date, interest to be paid semi-annually, and said bonds to become due and payable as follows, to-wit:

No.	Denomination	Maturity
1	$500	May 10 1928
2	100	Nov 10 1928
3	500	Nov 10 1928
4	500	May 10 1929
5 to 10 Inc	1000	Nov 10 1929
11	500	Nov 10 1929
12 to 17 "	1000	May 10 1930
18	500	May 10 1930
19 to 21 "	100	May 10 1930
22 to 31 "	1000	Nov 10 1930
32 to 41 "	1000	May 10 1931
42 to 45 "	100	May 10 1931
46 to 55 "	1000	Nov 10 1931
56	500	Nov 10 1931
57 to 59 "	100	Nov 10 1931
60 to 70 "	1000	May 10 1932
71	$100	May 10 1932
72 to 94 Inc	500	Nov 10 1932
95 to 117 "	500	May 10 1933
118 to 121 "	100	May 10 1933
122 to 133 "	1000	Nov 10 1933
134 to 136 "	100	Nov 10 1933
137 to 148 "	1000	May 10 1934
149	500	May 10 1934
150 to 151 "	100	May 10 1934
152 to 164 "	1000	Nov 10 1934
165 to 166 "	100	Nov 10 1934
167 to 179 "	1000	May 10 1935
180 to 186 "	100	May 10 1935
187 to 214 "	500	Nov 10 1935
215	100	Nov 10 1935
216 to 229 "	1000	May 10 1936
230 to 236 Inc	$ 100	May 10 1936
237 to 251 "	1000	Nov 10 1936
252	100	Nov 10 1936
253 to 577 Inc	$ 500	May 10 1937
578 to 588 "	100	May 10 1937
589 to 748 "	1000	May 10 1937

The Mortgagor hereby reserves the right to redeem at 102 and *and* interest, all or any of the above numbered bonds on May 10th, 1929, or any semi-annual interest payment date thereafter, upon giving thirty (30) days advance notice in writing. All of which bonds are in substantially the following form and differ only as to the dates of maturity and amounts, to-wit: [86]

UNITED STATES OF AMERICA

No..... $500.00

State of
Washington

MARLBOROUGH HOUSE

FIRST MORTGAGE SEVEN PER CENT
SINKING FUND GOLD BOND

For value received, Marlborough Investment Co., a corporation, organized and existing under and by virtue of the laws of the State of Washington, does hereby promise to pay to bearer hereof, or, if registered, to the registered holder hereof, on the 10th day of May, 1928, the principal sum of

Five Hundred Dollars ($500)

together with interest thereon, from the 10th day of May, 1927, at the rate of Seven (7) per cent per annum until maturity, payable semi-annually on the 10th days of May and November of each year, on the presentation and surrender of the attached interest coupons as they severally become due. After maturity this bond shall draw interest until paid

at the rate of Twelve (12) per cent per annum, and each coupon hereof, after its maturity, shall in like manner draw interest until paid at the rate of Twelve per cent per annum. Both principal and interest are payable in gold coin of the United States of America, of the present standard of weight and fineness, with New York Exchange, at the office of Wm. D. Perkins & Co. Bankers, in the City of Seattle, State of Washington, without deduction from either principal or interest for or on account of any Federal Income Tax, (except such portion of any such tax as shall be in excess of the normal income tax or of a sum equal to 2% of such interest in any one year) which the Trustee named, or its successors or agents, may be required to pay thereon or permitted to retain therefrom under any present or future law, regulation or requirement of the State of Washington, or the United States of America.

This bond is one of an issue of Seven Hundred Forty Eight (748) Bonds, aggregating the sum of Five Hundred Thousand Dollars, ($500,000), all of the same date, tenor and effect, excepting as to denominations and maturities, each of which bonds, with the interest coupons thereto attached, is secured without preference, priority or distinction of one bond over another, [87] and secured by a Mortgage or Trust Deed, dated May 10th, 1927, executed by Marlborough Investment Co. to The

National Bank of Commerce of Seattle, a corporation, as Trustee, constituting a first mortgage lien upon:

> Lots 1 and 4, and the West 32 Feet of Lots 2 and 3, Block 116, A. A. Denny's Broadway Addition to the City of Seattle, Washington—together with all gas or electric stoves, refrigeration, wall beds, hall carpets and room carpets, lighting fixtures, window shades and fixtures, and furniture of 60 apartments installed and furniture of all other apartments, halls, lobby and other rooms of the building and the garage adjoining, furnished now or hereafter in the buildings being constructed upon the above described lots, known as Marlborough House,

situated thereon, and the furnishings thereof, and duly recorded as a real estate mortgage and filed as a chattel mortgage in the office of the Auditor of King County, Washington.

As set forth and more particularly described in said Mortgage or Trust Deed, and subject to the terms and conditions of which said mortgage or Trust Deed, this bond is issued, accepted and held.

This bond shall not become valid or obligatory until authenticated by the signature of the Trust Officer of The National Bank of Commerce of Seattle, as Trustee, to the certificate on the back hereof.

It is further agreed that if default be made in the payment of any of said interest coupons, or of

the said principal sum when and where the same shall become due, then interest at the rate of Twelve percent per annum shall be allowed on such principal and interest in default until the same are fully paid.

The right is hereby expressly reserved, upon thirty (30) days previous written notice of intention to do so, and upon the further terms and conditions prescribed in said Trust Deed, to pay on May 10th, 1929, or any semi-annual interest payment date thereafter, any or all of said bonds at such time outstanding and unpaid, by the payment of principal accrued interest and a premium of Two per cent of the principal of the bonds so paid.

Upon receipt of such written notice of intention to pay before maturity any of such bonds, Wm. D. Perkins & Co., Bankers, or Its Successors, shall mail, to the last known address of the last known owner, of such bonds as shown by the records of Wm. D. Perkins & Co., Bankers, written notice of the call for payment of such bonds; such notice to be sent by registered mail, and the records of Wm. D. Perkins & Co., Bankers, showing the mailing of such notice shall be accepted as positive proof thereof and interest on all bonds so called shall cease at the maturity of the interest coupon immediately succeeding the mailing of the call.

Consent is hereby given to the entry of a deficiency judgment against the undersigned for the debt evidenced hereby to the intent that said debt

may be paid in full, irrespective of the security, in the said Mortgage or Deed of Trust described.

In Witness Whereof, Marlborough Investment Co. has caused this bond to be signed in its corporate name by its proper officers and its corporate seal to be hereto affixed, and the interest coupons hereto annexed to be authenticated by the fac simile signatures of its officers, as of the 10th day of May, 1927.

MARLBOROUGH INVESTMENT CO.

[Seal]

Attest:.....

Secretary

By.....

President. [88]

TRUST CERTIFICATE

The National Bank of Commerce of Seattle, Seattle, Washington, a corporation, the Trustee named in the foregoing bond and in the Trust Deed therein referred to, does hereby certify that the within bond is one of a series of Seven Hundred and Forty Eight (748) bonds, numbered from one (1) to Seven Hundred Forty Eight (748), both numbers inclusive, described in and referred to in the within mentioned Mortgage or Trust Deed as secured thereby.

THE NATIONAL BANK OF COMMERCE OF SEATTLE,

By.....

Its Trust Officer.

This bond may be registered in the holder's name on the books of the registrar, Wm. D. Perkins & Co., Bankers, Seattle, Wash., and such registration shall be entered on the bond after which no transfer shall be effectual unless it is made upon said books and noted on the bonds; that the same may be discharged from registration by being transferred to bearer after which it would be transferable by delivery but may again and from time to time be registered as before. The coupons shall be payable to bearer not withstanding the registry of the bond unless the coupons shall be surrendered in which case the interest shall be payable to the registered holder.

Whereas, Marlborough Investment Co., has done all things necessary to make said bonds and this Deed of Trust valid and binding obligations of said party;

Now, Therefore:—For the purpose of securing the payment of principal and interest of said bonds and each of them, according to the terms and conditions thereof, and in the performance of the covenants and agreements herein contained, and in consideration of the premises and of the purchase of said bonds by the holders thereof, and the sum of One Dollar ($1.00) to it in hand paid by said Trustee, and of other good and valuable considerations, receipt of which is hereby acknowledged, [89] said Marlborough Investment Co. has granted, bargained, sold, mortgaged, conveyed and warranted and by these presents does grant, bargain, sell, mort-

gage, convey and warrant unto the said Tristee and unto its successors, the following described property situated in Seattle, King County, Washington, to-wit:

> Lots 1 and 4, and the West 32 Feet of Lots 2 and 3, Block 116, A. A. Denny's Broadway Addition to the City of Seattle, Washington—together with all gas or electric stoves, refrigeration, wall beds, hall carpets and room carpets, lighting fixtures, window shades and fixtures, and furniture of 60 apartments installed and furniture of all other apartments, halls, lobby and other rooms of the building and the garage adjoining, furnished now or hereafter in the buildings being constructed upon the above described lots, known as Marlborough House,

Together with all buildings and improvements now thereon or hereafter to be made or constructed thereon, and all and singular the tenaments, hereditaments and appurtenances thereunto belonging or in anywise appertaining and the rents, issues and profits thereof, and the attached list of furniture showing the number of each, the name of manufacturor and the factory number of article.

To Have and to Hold all and singular the said property and the appurtenances unto the said Trustee and its successors, Forever.

In Trust, Nevertheless, for the equal proportionate benefit, security and protection of the owners and holders of said bonds, and each of them, without preference and for enforcing payment thereof when

payable, according to the terms, conditions, spirit and intent of said bonds, and of this deed and upon the covenants and agreements herein contained as follows:

First: This mortgage, or Deed of Trust, is to be a continuing lien to secure the full and final payment of the principal and interest of all bonds which are secured hereby.

Second: The bonds intended to be secured hereby shall be executed by Marlborough Investment Co., and delivered to the Trustee, and the Trustee shall certify and deliver said bonds from time to time upon and pursuant to written authority, and the Trustee shall not be under [90] any duty to look behind the same and shall not be in any way responsible for the issuance and negotiation of said bonds or of the application of their proceeds. Only such of said bonds as shall be certified and authenticated by the Trustee by signing the certificate endorsed thereon, shall be secured by this mortgage, or Deed of Trust; or be entitled to any lien or benefits hereunder.

Third: The Mortgagor covenants and agrees that it will fully and entirely pay and satisfy the whole of the said bonds to be issued hereunder, principal and interest, according to the terms thereof, without delay and pay all taxes and assessments upon said property or upon this Mortgage, or upon the notes of indebtedness secured hereby, without deduction from either principal or interest for or on account of any Federal Income Tax, (except such portion of

any such tax as shall be in excess of the normal, income tax or of a sum equal to 2% of such interest in any one year) which the Trustee named, or its successors or agents may be required to pay thereon or permitted to retain therefrom under any present or future law, regulation or requirement of the State of Washington, or the United States of America, at least ten days before delinquency.

Fourth: Until default shall be made in the payment of principal or interest of any of the bonds secured hereby, or any part thereof, as and when the same shall become due and payable or in the performance and observance of any condition, covenant or requirement of said bonds or of this Mortgage or Deed of Trust, the Trustee shall permit and suffer the Mortgagor, its successors, executors, administrators or assigns, to possess, operate and enjoy the property hereby mortgaged, with the appurtenances thereto belonging in any manner by them desired, and to receive and use the total income, rents, issues and profits thereof.

Fifth: Upon the payment at maturity or the retirement prior to maturity by payment of the bonds herein provided for and hereby secured, the said bonds shall be cancelled and delivered forthwith to the Trustee.

Sixth: The Mortgagor covenants and agrees that it shall and will from time to time pay and discharge, before the same shall fall into arrears, all taxes, water rates, assessments and other charges lawfully imposed upon the said mortgaged premises

or any part thereof, and will pay [91] and discharge all claims of any kind and nature which may hereafter become a lien upon the said mortgaged premises, or any part thereof, so that the priority of this Mortgage may be observed, and will keep said mortgaged premises and every part thereof in good order and repair, and shall not and will not create, or suffer to be created, any mechanic's lien or any charge whatsoever upon the mortgaged premises which might or could be prior to the lien of this Mortgage or Deed of Trust, until the bonds hereby secured and all interest accruing thereon shall be fully paid and satisfied.

Seventh: The Mortgagor covenants and agrees that it shall and will at all times until said bonds hereby secured, with all interest thereon shall be fully paid and satisfied, keep such parts of the mortgaged premises as are liable to be destroyed or injured by fire, insured against loss by fire in some solvent insurance company or companies, authorized to transact business in the State of Washington, and approved by the Trustee, to an amount equal to the insurable value of said property and not less than Six Hundred Thousand Dollars, ($600,000.00) payable in case of loss to the Trustee. And in the event of said premises or furnishings being injured or destroyed by fire, the Mortgagor shall proceed to replace the furnishings and repair the building at once or reconstruct the same, and as they are replaced, repaired or reconstructed, the Trustee shall advance out of the money received

from such insurance, on account of such loss, such sums as are necesary to replace, repair or reconstruct the same, unless the moneys so received by the Trustee are sufficient to pay all of the indebtedness then secured by this Trust Deed, in which event it shall be optional with the Mortgagor as to whether or not it will repair or reconstruct the said premises. If it shall not exercise its option and begin the replacement, repair or reconstruction within ten days after said loss takes place, the Trustee shall apply the said sum to the pro rata payment of the outstanding indebtedness secured hereby. In the event of said buildings being repaired, or reconstructed or furnishings replaced, a written statement by the Mortgagor, stating the amount applied by it to the replacement, repair or reconstruction of the premises so destroyed or damaged, or to the [92] erection of other permanent improvements upon the said mortgaged premises, shall be full authority and protection to the Trustee for the payment to it of the amounts stated in such written statement, and the Trustee shall be under no duty or obligation to look behind such statement, and shall not be in anywise responsible for the application of any money so paid over by it.

Eighth: The Mortgagor shall and will from time to time during the continuance of this Trust Mortgage, execute and deliver all such further instruments and conveyances as may be necessary to vest in the Trustee and its successors, title to the within

described property and all subsequently acquired title, or rights, to the property within.

Ninth: In case default shall be made in payment of the principal or interest of said bonds when the same shall become due and payable, or in the observance of any of the covenants and conditions in said bonds or herein contained, upon the part of the Mortgagor, to be kept and performed and such default continue for sixty days, it shall be the duty of the Trustee, upon the request in writing of three-fourths (¾) of the interest of the said bonds secured hereby and then outstanding, executed and acknowledged by the holders, or by their attorneys, thereunto duly authorized in writing, and upon satisfactory indemnification, to proceed forthwith to enforce the rights of the said Trustee and of the bondholders hereunder, by sale and entry, or by judicial proceedings of such property as the Trustee, being advised by counsel shall deem most expedient in the interest of the holders of the bonds secured hereby; the choice between such remedies being left to the discretion of the trustee. Out of the proceeds of any sale or sales of the mortgaged premises hereunder the Trustee shall in the first place reimburse itself and discharge and pay the costs and expenses incurred in and by such foreclosure and sale, or otherwise to inspect the premises, including a reasonable reimbursement for its own services and for fees of counsel, and shall apply ratably the same to the payment of the principal due upon the bonds issued under and secured

hereby as shall then be outstanding, together with the interest thereon to [93] the date of such application of payment; and the overplus, if any, of such proceeds of sale shall be paid over to the Mortgagor.

Tenth: Upon the filing of a bill in equity, or the commencement of other judicial proceedings, to enforce the rights of the Trustee and the bondholders under this Deed of Trust, the said Trustee, shall be entitled as a matter of right, to the appointment of a Receiver of the property hereby mortgaged, and of the earnings, income, rents, issues and profits thereof, pending such proceedings.

Eleventh: Upon the full and final payment of both principal and interest of all bonds which shall have been issued hereunder, the Trustee shall, upon the written request of the Mortgagor, enter a Satisfaction of this mortgage upon the records, and shall do, execute, make and deliver such deeds, acts, instructions and assurances as may be necessary to revest the title to the mortgaged property in the said Mortgagor, its executors, administrators or assigns, free and discharged from the lien of these presents.

Twelfth: No part of the premises hereby mortgaged or intended to be, shall be sold under proceedings, either by law or equity by the holder or holders of the bonds secured hereby, otherwise than in accordance with the provisions hereof, it being the intention of the parties to vest the right to take action or proceedings at law or in equity for foreclosure solely in the Trustee; and no bondholder

or bondholders, shall take proceedings against the Mortgagor to enforce the provisions of this mortgage unless the Trustee shall have been requested in writing by the holders of three-fourths (¾) of the bonds secured hereby and then outstanding, to take action, and shall after tender to it of reasonable indemnity, have refused to or neglected to do so.

Thirteenth: The Mortgagor shall create a sinking fund for the purpose of retiring the bonds secured by this Deed of Trust and shall deposit same with Wm. D. Perkins & Co., Bankers. A sum equal to one-sixth of the principal maturing at the next coupon date must be deposited [94] on or before the 20th day of each month prior to the coupon date, and the Mortgagor shall deposit in said fund monthly thereafter on or before the 20th day of each month, an equal amount to redeem the bonds coming due on the following coupon date and one-twelfth of the estimated annual current taxes and insurance premiums, unless for a good and sufficient reason, proven to the satisfaction of Wm. D. Perkins & Co., Bankers, such sinking fund deposit should be temporarily suspended.

Fourteenth: The Mortgagor shall deposit on the 20th day of each and every month hereafter at the office of Wm. D. Perkins & Co., Bankers, of Seattle, Washington, sufficient funds to pay one-sixth of the interest coupon notes due on the next coupon date, of the outstanding bonds, and in default of the payment of either principal or interest, the Mortgagor agrees to pay to the said Wm. D. Perkins

& Co. Bankers, for its services rendered therein, One (1), percent of the principal and interest falling due at such date in addition to Eight (8) percent interest upon amount due.

Fifteenth: Upon the terms and conditions stated in this Article, and not otherwise, The National Bank of Commerce of Seattle, Seattle, Washington, hereby accepts the trust of this instrument and the Mortgagor and all future holders of bonds secured hereby, expressly assent, agree and acknowledge themselves bound by said terms and conditions.

The Trustee shall not be answerable to anybody for the default or mistake of the Mortgagor or of any of its agents, and the Trustee shall not be answerable to anybody for the default or mistake of any agent or attorney appointed by it in pursuance hereof, if such agent or attorney shall have been selected with reasonable care, or for anything whatever in connection with the Trust except wilful misconduct and gross neglect after personal notice or distinct notification in writing from some person interested in the trust.

The Trustee shall incur no liability to anybody in acting upon any notice, request, consent, certificate, bond document, or paper believed by it to be genuine and to have been signed by the proper person or persons. It shall be no part of the duties of the Trustee to see to the insurance of any part of the property hereby conveyed in trust, or to [95] itself effect such insurance. In accepting the trust of this instrument, the Trustee makes no covenant

or representations whatsoever as to the title or interest of the Mortgagor in and to the property described herein, nor to the amount or value of the security thereof; and it shall be no part of the duties of the Trustee, to see that any part of the property intended to be conveyed by the Trust, is properly subjected to the lien hereof or that the lien hereof is paramount to other liens; and the Trustee shall be under no obligation to see to the filing and recording of this instrument.

The Trustee shall not be or become personally liable for any debts contracted by it or for any damage to person or property arising out of the non-payment of salaries, non-fulfillment of contract, or for any other contractual or legal obligation or liability arising during the period wherein the Trustee shall manage the trust property hereunder. The Trust estate is hereby made primarily liable to such person for every liability of any kind, which the Trustee may incur hereunder; and the Trustee shall have a first lien upon the property hereby conveyed for compensation for services and reimbursement of expenses hereunder, with interest. The Trustee, shall not be under any obligation or duty to perform any act hereunder or to take any action toward the execution or enforcement of the Trust hereby created, or to commence to defend any suit with respect hereof, except upon the written request of the holders of three-fourths (3/4) of the bonds secured hereby, nor unless it be first satisfactorily indemnified from time to time, as in

the judgment of the Trustee may be required for its protection; nor shall Trustee be required to take notice of any default hereunder or to take any action in respect to the said default unless requested in writing, signed by the holders of at least three-fourths in interest of the bonds hereby secured and then outstanding, to take such notice and be furnished reasonable indemnity as aforesaid, anything herein contained to the contrary notwithstanding; but neither any such request nor this provision therefor shall effect any discretion herein or elsewhere especially given to the Trustee. [96]

In case of default or violation of the terms of this mortgage, the Trustee may, in its discretion, be advised by legal counsel to be selected and employed by it at the expense of the Mortgagor, and everything done and suffered in good faith by the Trustee in conformity with the advice of said counsel shall be conclusive in favor of the Trustee on the Mortgagor and on all holders of bonds secured hereby.

The duties of the Trustee to the Mortgagor and to the holders of bonds secured hereby shall be determined solely by the provisions of this instrument.

The Mortgagor agrees, from time to time, on demand, to pay to the Trustee reasonable compensation for its services hereunder, also to make reimbursement to the Trustee for counsel fees and other expenditures made by the Trustee hereunder, with interest thereon; also to protect and save the Trus-

tee harmless against all and any liability of any kind whatsoever which the Trustee may incur in the exercise and performance of its powers and duties hereunder, including any penalty suffered by the Trustee under this instrument or because of any action taken hereunder for non-compliance with the laws of Washington, or otherwise; and for said indemnification and reimbursement of the Trustee a first lien is hereby imposed in favor of the Trustee upon all of the property and funds hereby conveyed in Trust.

The recitals and statements herein and in the said bonds contained, save only the certificate of authentification by the Trustee, shall be taken as statements by the Mortgagor, and shall not be considered as made by or as imposing any obligation or liability upon the Trustee, nor shall the Trustee be held responsible for the legality and validity of the said bonds under any provision of the laws of the State of Washington, or otherwise. And it is further covenanted and agreed that the Trustee may resign and discharge itself of the Trust hereby created by notice to the Mortgagor to be given at least sixty (60) [97] days before such resignation.

Sixteenth: In case any bonds secured hereby shall become mutilated or lost, then, upon the surrender of such mutilated bond to the Trustee, or upon filing with the Trustee evidence of such loss, and giving indemnity which the Trustee shall consider satisfactory, the Mortgagor, in its discretion,

may issue to the holder and the Trustee may certify, a new bond bearing the same serial number and in identical form, in substitution and exchange for the bond so mutilated or lost.

Seventeenth: The Mortgagor covenants and agrees with the Trustee hereunder, that it will pay the necessary fees and expenses in the execution of the Trust hereby created.

In witness whereof, the said Marlborough Investment Co. has caused these presents to be signed by its President and Secretary and the corporate seal of said corporation to be hereunto affixed, and The National Bank of Commerce of Seattle, Seattle, Washington, in token of its acceptance of the trust herein contained has caused these presents to be signed by its Trust Officer and the corporate seal of said corporation hereto affixed the day and year first above written.

MARLBOROUGH INVESTMENT CO.
By COLIN O. RADFORD
President
And W. H. HARRIS
Secretary
THE NATIONAL BANK OF COMMERCE OF SEATTLE
By [Illegible]
Its Trust Officer

[Internal Revenue Stamps] [98]

PETITIONER'S EXHIBIT 5

Warranty Deed and Bill of Sale

Marlborough Investment Co.

To

The F. S. Stimson Company

DEED AND BILL OF SALE

The Grantor, Marlborough Investment Co., a corporation duly organized and existing under and by virtue of the laws of the State of Washington, for and in consideration of Ten Dollars ($10.00) in hand paid, conveys and warrants to The F. S. Stimson Company, a Delaware corporation, the following described real estate and personal property situated in King County, Washington, to-wit:

Lots one (1) and four (4) and the west thirty-two (32) feet of lots two (2) and three (3) block one hundred sixteen (116) A. A. Denny's Broadway Addition to the City of Seattle, together with all buildings and improvements situated thereon, including the Apartment House Building known as "Marlborough House" and Garage situated on said property, together with all electric stoves, refrigeration, wall beds, hall carpets and room carpets, lighting, fixtures, window shades and fixtures, and all other fixtures, furniture and equipment and personal property installed in the apartments, halls, lobby and other parts of said "Marlborough House" and Garage.

A more particular description of the personal property hereby conveyed is hereto attached, marked Inventory "A" and made a part hereof.

The above described real estate is conveyed subject to a mortgage executed by the grantor, under date of May 10, 1927, in favor of the National Bank of Commerce of Seattle, as Trustee, to secure an issue of bonds in the total principal sum of Five Hundred Thousand Dollars ($500,000.) bearing interest at the rate of seven (7) per cent per annum, which mortgage is of record in the office of the Auditor of King County, Washington, in Volume 1015 of Mortgages, at page 45.

The grantor hereby covenants to pay, on or before March 15, 1929, the general property taxes levied upon the real and personal property conveyed hereby. [114]

The grantor hereby warrants that it has a good and marketable title to the real and personal property described herein, and that the same is unencumbered except as herein stated, and that it will forever defend the same against any claims hereafter made.

Dated this 31st day of December, 1928.

In witness whereof, said Marlborough Investment Co. has caused these presents to be subscribed by its President and its corporate seal to be hereunto affixed and attested by its Secretary, the day and year first above written.

(M.I.Co.Corp.Seal)

MARLBOROUGH INVESTMENT CO.

By COLIN O. RADFORD,
President

Attest:

W. H. HARRIS,
Secretary

State of Washington,
County of King—ss.

This is to certify, that on this 31st day of December, 1928, before me, the undersigned, Notary Public in and for the State of Washington, duly commissioned and sworn, personally appeared Colin O. Radford, and W. H. Harris, to me known to be the President and Secretary respectively of Marlborough Investment Co., the corporation described in, and that executed the within and foregoing instrument, and acknowledged to me that they signed and sealed the said instrument, as the free and voluntary act and deed, of said corporation, for the uses and purposes therein mentioned, and on oath stated that they were authorized so to do and that the seal affixed to said instrument is the corporate seal of said corporation.

Witness my hand and official seal the day and year first above written.

(W.M.A.Notarial Seal)

WILLIAM M. ALLEN

Notary Public in and for the State of Washington, residing at Seattle. [115]

(Com. Ex. Aug. 25, 1930)

PETITIONER'S EXHIBIT 6

The F. S. Stimson Company,

to

Stimson-Moore Co.

Notice of Change of Corporate Name.

NOTICE OF CHANGE OF NAME
THE F. S. STIMSON COMPANY
TO
STIMSON-MOORE CO.

Notice is hereby given that The F. S. Stimson Company, a Delaware corporation, has changed its name to Stimson-Moore Co., and that a Certificate of Amendment to the Certificate of Incorporation effecting such change of name was filed in the office of the Secretary of State of the State of Delaware on March 10, 1931, and a certified copy thereof was filed in the office of the Secretary of State of the State of Washington on March 14, 1931. [122]

Dated at Seattle, Washington, this 20th day of May, 1931.

(S-M. Co. Corp. Seal) STIMSON-MOORE CO.
By WALTER A. MOORE,
President.

Filed for record at request of Charles T. Donworth, May 21, 1931, at 53 min. past 1 P. M.

GEORGE A. GRANT,
County Auditor. [123]

PETITIONER'S EXHIBIT 7

Stimson-Moore Co.,
to
Gardner J. Gwinn, Inc.,

Warranty Deed

DEED AND BILL OF SALE

THE GRANTOR, Stimson-Moore Co., a corporation organized and existing under the laws of the State of Delaware, for and in consideration of Ten dollars ($10.00) in hand paid, conveys and warrants to Gardner J. Gwinn, Inc., a corporation organized and existing under the laws of the State of Washington, the following described real estate and personal property situate in Kings County, Washington, to-wit:

Lots one (1) and four (4) and the west thirty two (32) feet of lots two (2) and three (3), block one hundred sixteen (116), A. A. Denny's Broadway Addition to the City of Seattle, together with all buildings and improvements situate thereon, including the apartment house building known as "Marlborough House" and garage situate on said property, together with all electric stoves, refrigeration, wall beds, hall carpets and room carpets, lighting fixtures, window shades and fixtures, and all other fixtures, furniture and equipment and personal property installed in the apartments, halls, lobby and other parts of said Marlborough House and garage, owned and installed therein by grantor.

A more particular description of the personal property hereby conveyed is hereto attached marked Inventory "A" and made a part hereof.

The above described property is conveyed subject to existing leases and rights of tenants occupying the premises and a mortgage indebtedness securing a bond issue in the sum of Five Hundred Thousand Dollars ($500,000), of which amount there was outstanding on May 1, 1931, as a liability only the sum of Four Hundred Sixty Four Thousand Seven Hundred Dollars ($464,700), which mortgage is of record in the office of the Auditor of King County, Washington, in Volume 1015 of mortgages, at page 45.

Grantor hereby covenants to pay on or before June 1, 1931, the general property taxes levied upon the real and personal property hereby conveyed for the year 1930. The grantee assumes payment of like taxes for the year 1931 and thereafter.

Dated this 3 day of June, 1931.

In witness whereof, Said Stimson-Moore Co. has caused these presents to be subscribed by its president and its corporate seal to be hereunto affixed and attested by its secretary the day and year last above written.

(S-M Co. Corp. Seal) Stimson-Moore Co.
By WALTER A. MOORE.
President.
Attest: R. W. SPRAGUE.
Secretary.

State of Washington,
County of King—ss.

This is to certify, That on this 3rd day of June 1931, before me, the undersigned Notary Public, in

and for the State of Washington, duly commissioned and sworn, personally appeared Walter A. Moore, and R. W. Sprague, to me known to be the president and secretary respectively of Stimson-Moore Co., the corporation described in and that executed the within and foregoing instrument, and acknowledged to me that they signed and sealed the said instrument as the free and voluntary act and deed of said corporation for the uses and purposes therein mentioned, and on oath stated that they were authorized so to do and that the seal affixed to said instrument is the corporate seal of said corporation.

Witness my hand and official seal the day and year in this certificate first shown written.

(L. F. M. Notarial Seal)

LUCIEN F. MARION,

Notary Public in and for the State of Washington, residing at Seattle. [126]

(Com. Ex. July 19, 1932)

Do not record Inventory,

WASHINGTON TITLE INS. CO.,

By BOB SHULTS.

Record and Index as a Deed and record and Index as a Bill of Sale.

WASHINGTON TITLE INS. CO.,

By BOB SHULTS.

Filed for record at request of Washington Title Ins. Co., June 4, 1931, at 49 min. past 4 P.M.

GEORGE A. GRANT,

County Auditor. [127]

PETITIONER'S EXHIBIT 8

Gardner J. Gwinn, Inc.

To Warranty Deed

State Developers, Inc.

Statutory Warranty Deed

(Corporate Form)

The grantor Gardner J. Gwinn, Inc., a Washington Corporation of Seattle, for and in consideration of Ten and No/100 Dollars ($10.00), in hand paid, conveys and warrants to State Developers, Inc. the following described real estate and personal property situated in the County of King, State of Washington:

Lots 1 and 4 and the West 32 feet of lots 2 and 3, block 116, A. A. Denny's Broadway Addition to the City of Seattle.

Subject to existing leases and rights of tenants occupying the premises and purchaser assumes and agrees to pay a mortgage indebtedness securing a bond issue in the sum of Five Hundred Thousand Dollars ($500,000), of which amount there was outstanding on February 26, 1932 Four Hundred Forty-six Thousand Five Hundred Dollars ($446,500), which mortgage is of record in the office of the Auditor of King County, Washington, in volume 1015 of mortgages, at page 45.

Purchaser assumes and agrees to pay second mortgage in favor of the Lincoln Securities, Inc. of which mortgage there is a balance of Forty-eight Thousand Seven Hundred Eigtheen and 43/100 Dollars ($48,718.43).

Subject to 1931 taxes.

In Witness Whereof, said corporation has caused this instrument to be executed by its proper officers and its corporate seal to be hereunto affixed this 26th day of February A.D. 1932.

(G. J. G. Inc. Corp. Seal)

GARDNER J. GWINN, INC.
By G. J. GWINN
President
Attest: O. H. JONES [130]

State of Washington,
County of King—ss.

On this 26th day of February, 1932, before me, the undersigned, a notary public in and for the State of Washington, duly commissioned and sworn, personally appeared G. J. Gwinn, to me known to be the President, respectively, of Gardner J. Gwinn, Inc., the corporation that executed the foregoing instrument and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated he was authorized to execute the said instrument and that the seal affixed is the corporate seal of said corporation.

Witness my hand and official seal hereto affixed the day and year in this certificate above written.

(R. W. D. Notarial Seal)

R. W. DALE
Notary Public in and for the State of Washington, residing at Seattle.

(Com. Ex. July 31, 1934)

Filed for record at request of Gardner J. Gwinn, Inc., Mar. 5, 1932, at 41 min. past 11 A.M.

GEORGE A. GRANT,
County Auditor [131]

PETITIONER'S EXHIBIT 9

State Developers Inc.
To
Russell L. Cooley

Quit Claim Deed

Quit Claim Deed

The grantor, State Developers Inc., a corporation, of the City of Seattle, County of King, State of Washington, for the consideration of Ten Dollars and other valuable considerations, in hand paid, conveys and quit claims Transfers and assigns to Russell L. Cooley, an undivided one-half interest in the following described real estate and personal property, situate in the County of King, State of Washington:

Lots 1 and 4, and the Westerly 32 feet of lots 2 and 3, in block 116, of A. A. Denny's Broadway Addition to the City of Seattle, together with all buildings and improvements situated thereon, including the apartment house building known as "Marlborough House" and the garage situate on said property, together with all electrical stoves, refrigeration, wall beds, hall carpets and room carpets, lighting fixtures, window shades and fixtures, and all other fixtures, furniture and equipment and personal property installed in the apartments, halls, lobbies and other parts of said Marlborough House and garage, together with all that certain personal property more particularly itemized and set forth in that certain Deed of Trust, recorded in the office

of the Auditor of King County, Washington, in volume 1015 of Mortgages, at page 45. [134]

Dated this 13th day of May, 1932.

(S. D. Inc. Corp. Seal)

STATE DEVELOPERS INC. (Seal)
By GARDNER J. GWINN, (Seal)
Pres.
By R. D. CARSON, (Seal)
Sec.

State of Washington,
County of King—ss.

On this 13th day of May, 1932, before me personally appeared Gardner J. Gwinn, and R. D. Carson, to me known to be the President and Secretary of the corporation that executed the foregoing instrument, and acknowledged said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument and that the seal affixed is the corporate seal of said corporation.

Given under my hand and official seal the day and year last above written.

(M. L. Notarial Seal)

MILDRED LANTZ
Notary Public in and for the State of Washington, residing at Seattle, Washington.

(Com. Ex. Apr. 2, 1935)

Filed for record at request of Hugo E. Oswald, Aug. 10, 1932, at 23 min. past 2 P.M.

GEORGE A. GRANT,
County Auditor [135]

PETITIONER'S EXHIBIT 10

In the Superior Court of the State of Washington for King County

No. ——

THE NATIONAL BANK OF COMMERCE OF SEATTLE, a corporation, as Trustee,

Plaintiff,

vs.

MARLBOROUGH INVESTMENT CO., a corporation; GENERAL PETROLEUM CORP. OF CALIFORNIA, a corporation; F. S. STIMSON COMPANY (now named Stimson-Moore Company), a corporation; GARDNER J. GWINN, INC., a corporation; LINCOLN SECURITIES, INC., a corporation; STATE DEVELOPERS, INC., a corporation; R. W. DALE and JANE DOE DALE, his wife; W. D. ASKREN and JANE DOE ASKREN, his wife,

Defendants.

LIS PENDENS

The plaintiff above named, The National Bank of Commerce of Seattle, a corporation, as Trustee, gives notice of the pendency of the above entitled action in the Superior Court of the State of Washington for King County against the above named defendants Marlborough Investment Co., a corporation; General Petroleum Corp. of California, a corporation; F. S. Stimson Company (now named

Stimson-Moore Company), a corporation; Gardner J. Gwinn, Inc., a corporation; Lincoln Securities, Inc., a corporation; State Developers, Inc., a corporation; R. W. Dale and Jane Doe Dale, his wife; W. D. Askren and Jane Doe Askren, his wife.

The object of said action is to foreclose and determine the lien of a certain mortgage or deed of trust dated May 10, 1927, executed by Marlborough Investment Co. to The National Bank of Commerce of Seattle as Trustee to secure the payment of a series of first mortgage 7% sinking fund gold bonds; which said bonds were seven hundred forty-eight [137] in number and numbered one to seven hundred forty-eight, both numbers inclusive, and aggregated the principal sum of Five Hundred Thousand ($500,000.00) Dollars and all bore interest at the rate of 7% per annum from their date; which mortgage or deed of trust was recorded in the office of the auditor of King County, Washington on the 20th day of May, 1927 in volume 1015 of Mortgages, at page 45, and to recover judgment for the indebtedness secured by said mortgage or deed of trust and to foreclose the defendants above named of their equity of redemption in and to the said premises described in the said mortgage or deed of trust, which premises are situated in the County of King, State of Washington, and more particularly described as follows, to-wit:

Lots 1 and 4, and the West 32 feet of Lots 2 and 3, Block 116, A. A. Denny's Broadway Ad-

dition to the City of Seattle, Washington—together with all gas or electric stoves, refrigeration, wall beds, hall carpets and room carpets, lighting fixtures, window shades and fixtures, and furniture of 60 apartments installed and furniture of all other apartments, halls, lobby and other rooms of the building and the garage adjoining, furnished now or hereafter in the buildings being constructed upon the above described lots, known as Marlborough House,

Together with all buildings and improvements now thereon or hereafter to be made or constructed thereon, and all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining and the rents, issues and profits thereof and

Also all of the personal property and furniture located on said premises and described with particularity in the complaint on file herein.

That the plaintiff as Trustee of said mortgage or deed of trust seeks recovery against the defendant Marlborough Investment Co. in the sum of:

(a) $15,886.50 together with interest thereon at the rate of 12% per annum from November 11, 1931 until paid.

(b) $11,100 together with interest thereon at the rate of 12% per annum from May 10, 1932 until paid. [138]

(c) $442,800 together with interest thereon at the rate of 12% per annum from May 10, 1932 until paid (less the sum of $21,485.16 now in sinking fund as hereinabove set forth).

(d) $5000 as attorneys' fee and $5000 as trustee's fees together with its costs and disbursements incurred herein including the sum of $75.00 for a title report, $19.90 for expenses of notifying bondholders and $250.00 for services of bondholders' committee.

Dated at Seattle, Washington, this 26 day of August, 1932.

KERR & McCORD
Attorneys for the Plaintiff
Post Office & Office Address:
1309 Hoge Building,
Seattle, Washington. [139]

[Endorsed]: Recorded vol 41 of Jdgts page 599 request of Kerr & McCord 1932 Aug 26 AM 10 02 George A. Grant Auditor King County, Wash. R. W. Flemming, Deputy.

[Endorsed]: Filed for Record at Request of Kerr & McCord 1309 Hoge Bldg. Seattle [140]

PETITIONER'S EXHIBIT 11

In the Superior Court of the State of Washington for King County

No. 256215

THE NATIONAL BANK OF COMMERCE OF SEATTLE, as Trustee, a corporation,

Plaintiff,

vs.

MARLBOROUGH INVESTMENT CO., a corporation, et al,

Defendants.

STIPULATION

It is stipulated between the plaintiff, through its attorneys, Kerr, McCord & Carey, and the defendants Gardner J. Gwinn, Inc., State Developers, Inc., Russell L. Cooley and Lillian A. Cooley, his wife, through their attorney, McClure & McClure and James Tynan, as follows:

1. That judgment may be entered herein forthwith in the usual form foreclosing the mortgage of the plaintiff and barring and foreclosing these defendants from all right, title and interest in and to said mortgaged premises of whatever kind or nature, provided, that no personal judgment imposing any liability upon these defendants, or any or either of them, by reason of plaintiff's mortgage shall be entered, nor shall any judgment for costs be entered against them.

2. The defendants State Developers, Inc. and Russell L. Cooley and Lillian A. Cooley, his wife, hereby deliver to the plaintiff a quit claim deed and bill of sale executed by said defendants, with the grantee's name left blank, and the said plaintiff or its attorneys are hereby authorized to fill in the name of any person they may nominate as such [141] grantee and to record said deed; and said deed shall have the effect of conveying to said grantee all right, title or interest of these defendants in or to said mortgaged premises, including the right to redeem allowed by law.

3. The plaintiff hereby delivers to for said defendants the sum of $10,000, which is one of the considerations for this stipulation and for the acts to be done by the defendants herein.

4. The defendants covenant and agree to turn over to the plaintiff or its nominee, on June 30, 1933, at six o'clock P.M., possession of the real and personal property described in the complaint herein, to hold the same in accordance with the foregoing deed and bill of sale. Said defendants further agree to pay all bills incurred in the operation of said apartment house for the month of June or heretofore. Said defendants are to retain all rentals heretofore collected and earned and are further to have and receive all rentals accrued and earned from said apartment house prior to the 1st day of July, 1933 and the plaintiff to have all rentals accruing thereafter and for greater certainty it is hereby stipulated that if any moneys are paid

to the defendants which moneys represent rentals earned for a period after June 30, 1933 they are to become the property of the plaintiff and to be by the defendants immediately turned over to the plaintiff. Similarly, if any moneys are paid to the plaintiff which moneys represent rentals earned for a period prior to July 1, 1933 they are to become the property of the defendants and to be by the plaintiff immediately turned over to the defendants.

5. The defendants stipulate that the appeal from that certain order of the Superior Court of King County, Washington, entered March 28, 1933, settling the accounts of the [142] receiver and making certain allowances, shall be dismissed. All parties herein stipulate that an order may be entered herein forthwith directing the Clerk of Court to turn over to the attorney for these defendants the net fund in the hands of said Clerk, growing out of the operation of said apartment house by the receiver, less the allowances made by the Court for the receiver, for his attorney, and for certain bookkeeping expense, the amount of the fund collected by the receiver being $9,954.17, the total amount of said allowances for the receiver being the sum of $1,087.35, the allowance for the attorney amounting to $750, and the allowance for bookkeeping expense amounting to $50, a total of $1,887.35, leaving a net fund to be paid to these defendants of $8,066.82 plus certain additional amounts thereafter paid in to the Clerk of said Court by said receiver, said additional amounts being in the sum

of $352.96 and which additional amounts are also to become the property of these defendants. The total amount to be paid by the Clerk of this Court to these defendants being in the sum of $8,419.78. The Clerk of this Court shall be further directed to pay to the receiver, to his attorney, and to the said bookkeeper, the amount of their respective allowances under said order of March 28, 1933.

Dated this 1 day of July, 1933.

KERR, McCORD & CAREY
Attorneys for Plaintiff
McCLURE & McCLURE &
JAMES TYNAN
Attorney for Defendants
ALLEN, FROUDE, HILEN &
ASKREN
As Attys for.

[Endorsed]: Filed in County Clerk's office King County, Wash. Jul. 1, 1933. Abe N. Olson, Clerk. By Alfred Olsen, Deputy. [143]

PETITIONER'S EXHIBIT 12

No. 256215

In the Superior Court of the State of Washington for King County

THE NATIONAL BANK OF COMMERCE OF SEATTLE, a corporation, as Trustee,

Plaintiff,

vs.

MARLBOROUGH INVESTMENT CO., a corporation; GENERAL PETROLEUM CORP. OF CALIFORNIA, A corporation; F. S. STIMSON COMPANY (now named Stimson-Moore Company), a corporation; GARDNER J. GWINN, INC., a corporation; LINCOLN SECURITIES, INC., a corporation; STATE DEVELOPERS, INC., a corporation; R. W. DALE and JANE DOE DALE, his wife; W. D. ASKREN and JANE DOE ASKREN, his wife; RUSSELL L. COOLEY and LILLIAN A. COOLEY, his wife; and HILDEGARDE A. DAILEY and EDWARD J. DAILEY, her husband,

Defendants.

DECREE

This matter having come on regularly for hearing on the first day of July, 1933, plaintiff appearing by its attorneys, Kerr, McCord & Carey; and the defendant Marlborough Investment Co., appearing by its attorney, James Chambers; and the defend-

ants Gardner J. Gwinn, Inc., a corporation, and State Developers, Inc., a corporation, by their attorneys, McClure & McClure and James Tynan; and the defendants W. D. Askren and Jane Doe Askren, his wife, by their attorneys, Allen, Froude, Hilen & Askren; and the defendants Russell L. Cooley and Lillian A. Cooley, his wife, by their attorneys, McClure & McClure and James Tynan; and the defendant Lincoln Securities, Inc., a corporation, by its attorneys, Allen, Froude, Hilen & Askren; and the defendants ~~R. W. Dale~~ [145] ~~and Jane Doe Dale, his wife, by their attorney, M. W. Vandercook~~; and the defendant F. S. Stimson Company (now named Stimson-Moore Company) having disclaimed any interest in said action and the remaining defendants, General Petroleum Corp. of California, a corporation, Hildegarde A. Dailey and Edward J. Dailey, her husband, having been adjudged to have been in default herein and not appearing; and the court having heard the evidence, considered the files and records in said cause including a stipulation between the plaintiff and the defendant Lincoln Securities, Inc., a corporation, authorizing the entry of a judgment and including a stipulation between the plaintiff and the defendant Gardner J. Gwinn, Inc., a corporation, State Developers, Inc., a corporation, Russell L. Cooley and Lillian A. Cooley, his wife, permitting the plaintiff to enter a judgment and having made its findings of fact and conclusions of law and being advised in the premises, it is now

Ordered, adjudged and decreed that the plaintiff, The National Bank of Commerce of Seattle, a corporation, Trustee, have and recover judgment against the defendant Marlborough Investment Co., a corporation, in the sum of $510,666.58 with interest thereon at the rate of 12% per annum from July 1, 1933 until paid together with its costs and disbursements to be taxed by the clerk including the sum of $75.00 for title search and the sum of $19.90 for expenses of notifying bondholders and the sum of $250.00 for services of bondholders' committee and the sum of $3,000.00 for trustee's fees and the sum of $3,000.00 to Kerr, McCord & Carey for attorneys' fees and

It is further ordered, adjudged and decreed that the plaintiff is entitled to possession of the mortgaged pre- [146] mises as of the 1st day of July, 1933 and to remain in possession thereof and collect all of the rents, issues and profits arising therefrom from and after the said 1st day of July, 1933 and that such sums shall pass to the purchaser at the foreclosure sale less all expenses of operating the property while in the possession of the Trustee and

It is further ordered, adjudged and decreed that the deed of trust or mortgage described in the complaint herein is a first, valid and subsisting lien paramount and superior to any and all right, interest, estate or equity of any of the defendants save such right of redemption as is allowed by law to said defendants upon the following described prop-

erty, situate in the City of Seattle, County of King, State of Washington, to-wit:

Lots 1 and 4, and the West 32 feet of Lots 2 and 3, Block 116, A. A. Denny's Broadway Addition to the City of Seattle, Washington—together with all gas or electric stoves, refrigeration, wall beds, hall carpets and room carpets, lighting fixtures, window shades and fixtures, and furniture of 60 apartments installed and furniture of all other apartments, halls, lobby and other rooms of the building and the garage adjoining, furnished now or hereafter in the buildings being constructed upon the above described lots, known as Marlborough House,

Together with all buildings and improvements now thereon or hereafter to be made or constructed thereon, and all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining and the rents, issues and profits thereof and

Also the following described furniture and personal property located on said premises:

60 Dressing Table Benches
10 #400 Forsyth "
" 875 Continental Benches
20 451
" 400
60 Night Tables
20 #400 Continental Tables
" 451

* * * *

[Part of inventory omitted per designation] [147]

60 Table Lamp Shades
4 907 DeVoto Lamp & Shade Co. Lamp Shades
3 245
5 504
3 407
4 306
" 903
3 474
4 243
" 454
5 714
6 533
4 477
2 207
3 401
5 909
3 905

and

It is Further Ordered, Adjudged and Decreed that the said mortgage be and it is hereby foreclosed and the Sheriff of King County, Washington is hereby directed to sell the said property in the manner provided by law for the sale of property in mortgage foreclosure causes and upon said sale of said property the proceeds of said sale shall be applied:

(a) To the payment of taxable costs in this action including title search in the sum of

$75.00, cost of printing the necessary notices to bondholders and the mailing of the same in the sum of $19.90 and the services of bondholders' committee in the sum of $250.00.

(b) To the fees allowed the plaintiff as trustee in the sum of $3,000.00 and fees allowed its attorneys, Kerr, McCord & Carey, in the sum of $3,000.00.

(c) To the payment of any expenses for the management and operation of the said property should the rent, income and profit thereof not exceed such expenses.

(d) To the payment pro rata of principal and interest on all outstanding bonds secured by the trust deed or mortgage without preference to any one bond or to interest thereon for any other bond or bonds.

(e) To the payment of the surplus, if any, as the court may by further order direct, and

It is Further Ordered, Adjudged and Decreed that any party to this action including the trustee or any other [157] person may become a bidder at said sale and the successful bidder at said sale may make payment of his bid in cash or in bonds or partly in cash and partly in bonds secured by said trust deed or mortgage but such purchaser shall in any event pay in cash the following amounts:

(a) Amount necessary to pay the costs and disbursements including title search.

(b) Allowance of compensation to the trustee.

(c) Allowance of compensation to Kerr, McCord & Carey, its attorneys.

(d) Allowance to the trustee for any expenses in event the expenses of operating the property are less than the receipts thereof together with reasonable compensation to the trustee or its employees for the management of said property.

Any sums so paid shall be delivered by the Sheriff or the Clerk to the plaintiff and by it distributed to the parties entitled thereto. The balance of the purchase price shall be paid either in cash or by delivery to the Sheriff of all outstanding bonds of the issue secured by said trust deed or mortgage hereby foreclosed with all interest coupons dated the 10th day of May, 1932 and subsequent thereto attached; or may be paid partly in cash and partly in bonds of the issue secured by said trust deed or mortgage hereby foreclosed with all interest coupons dated the 10th day of May, 1932 and subsequent thereto attached, and in event the bid is made under this provision of this decree all bonds and coupons shall be received by the Sheriff at such price or value as shall be equivalent to the sum which would be payable on said bonds and coupons out of the proceeds of said sale if the sale had been for cash and the owner of each bond so bid shall be entitled to his just share and proportionate interest in the property purchased by reason of said bid. If bonds and cou-

pons are tendered as partial payment of the purchase price at said sale [158] the purchaser at said sale shall also tender in cash a sum that will entitle owners of bonds and coupons which are not offered as a part payment of the purchase price their pro rata share and just proportion of the sale price of the property, i.e., a sum equivalent to the amount of cash that each bondholder would have received had the entire purchase price been paid in cash. If bonds are offered in whole or in part at said sale and the person offering the same is the successful bidder, and said sale is duly confirmed, said bond shall be thereby considered paid and cancelled, if the said bid is for the full amount of said judgment, or if the said bid does not amount to a full payment of the said judgment or a full payment of the said bonds and coupons, the said bonds and coupons shall be considered as paid to the extent the sum made on the sale amounts to a pro rata payment thereof.

All bonds, unless bearer bonds, offered to the Sheriff as payment or partil payment of purchase price at said sale shall be duly assigned and endorsed in blank by the registered holders thereof, and

It is Further Ordered, Adjudged and Decreed that any purchaser at said sale shall be entitled to possession of [159] the purchased premises upon the payment of the purchase price and the confirmation of said sale, and

It is Further Ordered, Adjudged and Decreed that in the event the trustee shall be the successful bidder at said sale, the said property, its rents, issues and profits shall thereafter be held by the trustee for the benefit of the owners of the bonds which have been deposited with the trustee and used by it in bidding for said property, and

It is Further Ordered, Adjudged and Decreed that the court retains jurisdiction to direct and control the disposition of the proceeds of the said sale, and to control and direct the trustee in the management and disposition of the property after the said sale, should the trustee become the purchaser, and to control and determine all matters arising out of or in connection with the trust indenture and the administration and distribution of the trust property acquired by the trustee at said sale, and to control and determine the rights and claims of any bondholders or other persons against the trustee or the trust property to establish their interest in the said trust fund or the trust property and to determine any rights arising out of the trust fund or property and/or against the trustee, and all questions, issues, matters and things not hereby disposed of. Any party to this action or any party entitled to participate in the said property or the proceeds of said sale may apply at any time to this court for further relief in respect to any matter not herein specifically provided for and

in respect to any of their rights hereby controlled or affected.

Done in Open Court this 1st day of July, 1933.

ROSCOE R. SMITH,

Judge.

Presented by:

E. S. McCORD

One of the Attorneys for Plaintiff

O. K. McClure & McClure & James Tynan, Attys for Defts.

O. K. Allen, Froude, Hilen & Askren, atty for Defts. Askren & Lincoln Securities Inc.

O. K. James R. Chambers, atty for Marlborough Investment Co.

Filed in County Clerk's office King County, Wash. Jul. 1, 1933 Abe N. Olson, Clerk By Alfred Olsen, Deputy.

Entered in execution docket vol. 113 page 104 Judgment number 122719 [160]

PETITIONER'S EXHIBIT 13

In the Superior Court of the State of Washington for King County

No. 256215

THE NATIONAL BANK OF COMMERCE OF SEATTLE, a corporation, as Trustee,

Plaintiff,

vs.

MARLBOROUGH INVESTMENT CO., a corporation; GENERAL PETROLEUM CORP. OF CALIFORNIA, a corporation; F. S. STIMSON COMPANY (now named Stimson-Moore Company), a corporation; GARDNER J. GWINN, INC., a corporation; LINCOLN SECURITIES, INC., a corporation; STATE DEVELOPERS, INC., a corporation; R. W. DALE and JANE DOE DALE, his wife; W. D. ASKREN and JANE DOE ASKREN, his wife; RUSSELL L. COOLEY and LILLIAN A. COOLEY, his wife; and HILDEGARDE A. DAILEY and EDWARD J. DAILEY, her husband,

Defendants.

ORDER CONFIRMING SALE

This cause coming on regularly to be heard upon the application of the plaintiff for confirmation of the sale made on the 30th day of September, 1933 by the Sheriff of King County, Washington, of the property hereinafter described under and by virtue

f an order of sale issued in the above entitled
ction, it is now by the court
Ordered, Adjudged and Decreed as follows:

I.

That due and legal notice of said sale was given
y posting and publishing the same in all respects
s required by law and that the property so sold
s situated in King County, Washington and is
escribed as follows: [162]

Lots 1 and 4, and the West 32 feet of Lots 2 and
, Block 116, A. A. Denny's Broadway Addition
o the City of Seattle, Washington—together with
ll gas or electric stoves, refrigeration, wall beds,
all carpets and room carpets, lighting fixtures,
vindow shades and fixtures, and furniture of 60
partments installed and furniture of all other
partments, halls, lobby and other rooms of the
uilding and the garage adjoining, furnished now
r hereafter in the buildings being constructed
pon the above described lots, known as Mari-
borough House,

Together with all buildings and improvements
ow thereon and all and singular the tenements,
ereditaments and appurtenances thereunto belong-
ng or in anywise appertaining and the rents, is-
ues and profits thereof and

Also the following described furniture and per-
sonal property located on said premises:

60 Dressing Table Benches
10 #400 Forsyth "
" 375 Continental Benches

20 451
" " 400
60 Night Tables
20 #400 Continental Tables
" 451
10 375
" 400 Forsyth Tables
60 Bedroom Chairs
20 #400 Continental Chairs
" 451
10 375
" 400 Forsyth Chairs
100 Bed Springs
100 Premier DD Tru-Flex Coil Springs
100 Mattresses
100 pr Jewel Carman Mfg Co Mattresses
100 Pair Pillows
100 pr Live Goose Emerick Feather Pillows
100 Bed Pads
100 Page Bed Pads
100 Table Pads
100 Page Table Pads
50 Dozen Sheets
50 Dz Page 81x99 sheets
100 Dozen Pillow Slips
100 Dz Page Pillow Slips
60 Dozen Hand Towels
60 Dz Page Hand Towels
[Balance of Inventory omitted per designation.]

[163]

II.

That on the said 30th day of September, 1933 all right, title and interest of the defendants in said action and all per- [172] sons claiming by, through or under them in and to said property and each and every part thereof was sold by said sheriff to Wm. O. Perkins, T. H. Lovell and W. O. Bulette pursuant to said order of sale for the sum of $340,425.00 which said sum constituted a payment of $30,000.00 for the personal property and $310,425.00 for the real property and that said bids were the highest and best made therefor.

III.

That in accordance with the terms of the decree made and entered in this cause the purchase price was paid by said purchasers partly in bonds secured by the mortgage foreclosed upon in said action and partly in cash. That the total amount of the bonds outstanding at the time of said sale and secured by said mortgage was $453,900.00. That at the time of said sale there was deposited with the sheriff to apply upon the purchase price of said real and personal property bonds in the principal amount of $441,100.00 leaving a total of bonds not deposited with said sheriff in the amount of $12,800.00. That the costs and expenses of the foreclosure proceedings amount to $6,425.64, all of which costs and expenses were by said sheriff charged against the sale of said personal property leaving a net purchase price for said personal

property of $23,572.36 and a net purchase price for said real property of $310,425.00. That the holders and owners of said $12,800.00 of non-depositing bonds are entitled to their just proportion of the purchase price after deducting therefrom the costs and expenses of the action as aforesaid, to-wit: 12,800/453,900 thereof or $664.32 on account of the purchase price of said personal property and $8,753.92 on account of the purchase price of said real property or a total cash payment to said non-participating bondholders in the sum of $9,418.24. That said cash payment for said non-participating bondholders should be divided among [173] them in proportion to their respective holdings of said bonds.

IV.

That the said sheriff in so making such sales duly made his returns of his proceedings under said order of sale on the 3rd day of October, 1933 and more than ten days have elapsed since the filing of the returns by said sheriff of the said sales. That the plaintiff has moved for an order of confirmation. That neither the judgment debtors nor any other persons have filed with the clerk any objections to the sales. That there have been no irregularities in the conduct of said sales and all notices required by law have been given and the sales have been regularly held and that the price bid for the property is fair and adequate in amount.

V.

That the said sales so made to the said Wm. D. Perkins, T. H. Lovell and W. O. Bulette by said sheriff with all of the proceedings in the premises be and the same are hereby in all respects approved and confirmed.

Done in Open Court this 16 day of October, 1933.

JAMES B. KINNE,

Judge.

Presented by:

E. S. McCORD,

One of the Attorneys for the Plaintiff.

[Endorsed]: Filed in the County Clerk's Office King County, Wash., Oct. 16, 1933.

ABE N. OLSON,

Clerk.

By A. L. LAWRENCE,

Deputy [174]

PETITIONER'S EXHIBIT 14

Wm. D. Perkins & Co., Bankers
Investment Securities
Safe Deposit Vaults
Seattle, Washington

July 10th, 1933.

National Bank of Commerce,
Seattle, Wash.

Gentlemen:

Replying to yours of the 6th, in regard to Mar-

borough House, we have today appointed Russell C. Perkins agent for collecting the rentals and paying the expenses and general management of the building.

Yours truly,

WM. D. PERKINS,
W. O. BULETTE,
T. H. LOVELL,
Bondholders Committee. [178]

WDP-Y

171

MARLBOROUGH HOUSE — SOLE OWNERSHIP

In Account With
THE NATIONAL BANK OF COMMERCE OF SEATTLE

Signatures Authorized (No. 1) Required on Each Check (No. 1)

I agree that the conditions printed on your deposit tickets and in your pass books shall apply to all items other than cash which you receive on deposit or for collection.

I also agree to (CALL FOR) (HAVE MAILED TO ME IN ORDINARY MAIL) statement of my account and cancelled vouchers monthly, and thereby expressly release the Bank from liability and claim of loss in case I fail to report to the Bank within ten days from receipt of statement any discrepancies or irregularities in connection with the account.

Below find signatures which you are authorized to recognize in payment of funds and the transaction of other business for account of.—

Name of Business — Date 32

Marlborough House

Owner or Proprietor

Authorized Signature R. C. Perkins.

Authorized Signature

MARLBOROUGH HOUSE

Address 211 Cherry St Phone Ele 4320

Business

Introduced by

Bank References

Amt. Original Deposit 21 34 63

Copy of Sole Owner Authority on File

Remarks

9/1933

11-3

WM. C. PERKINS & CO., BANKERS 19-52-12

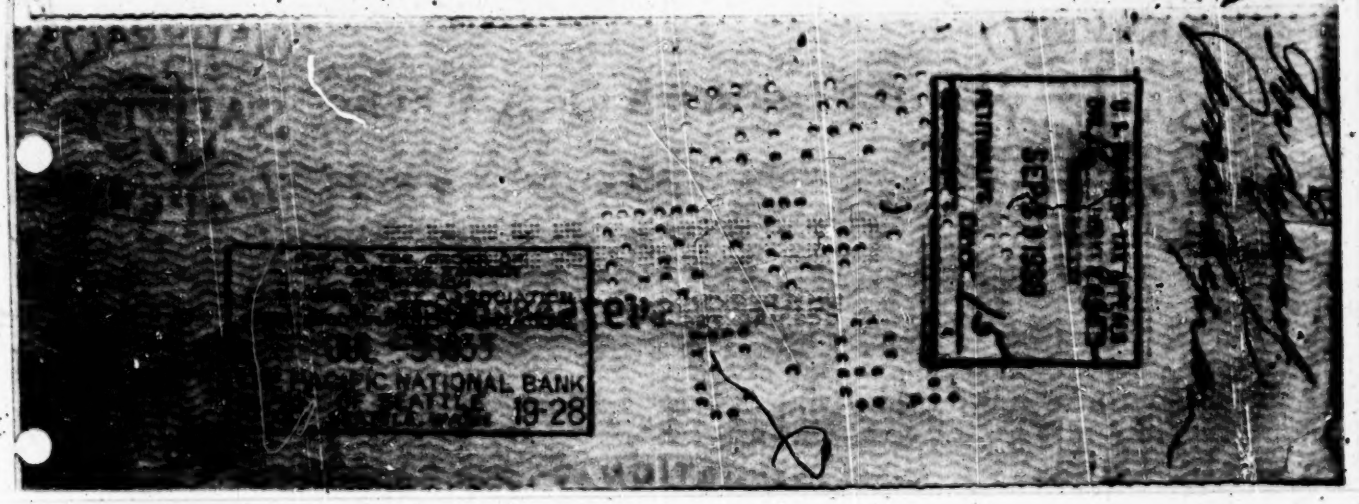
SEATTLE, WASH. JUL 1 1933 No 63192

PAY TO THE ORDER OF [illegible] $ [illegible]

WM. C. PERKINS & CO., BANKERS $4975 AND 00 CTS DOLLARS

To THE NATIONAL BANK OF COMMERCE
19-3-12 SEATTLE, WASH.

[illegible] PRESIDENT
[illegible] CASHIER



121

WM. D. PERKINS & CO., BANKERS 19-52-12

JUL 1 1933

SEATTLE, WASH. № 63191

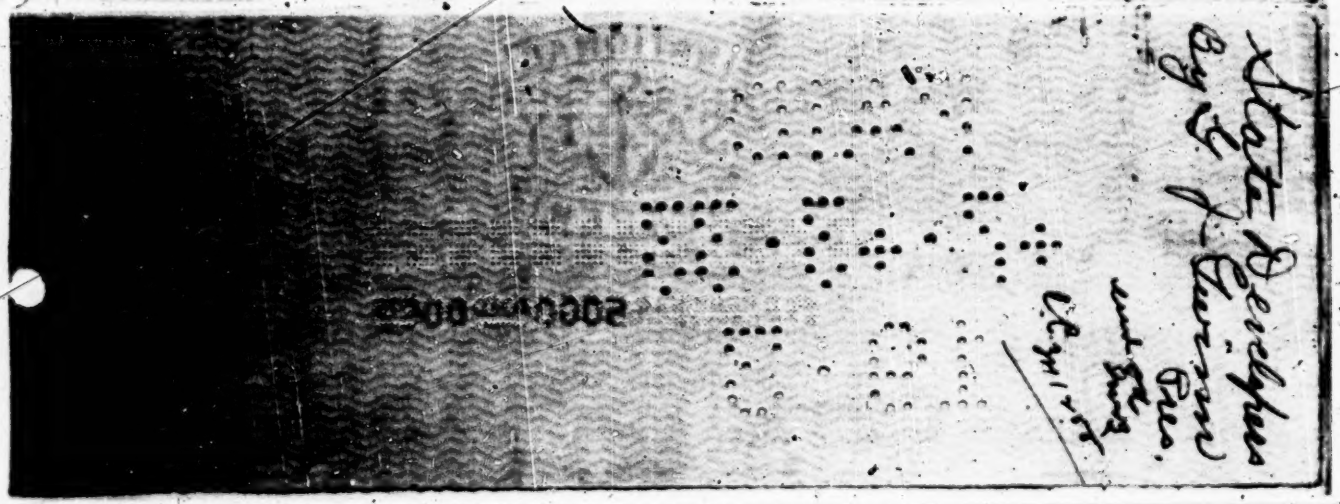
PAY TO THE ORDER OF [illegible] $5000 00

[illegible] WM D PERKINS & CO BANKERS $5000 AND 00 CTS DOLLARS

To THE NATIONAL BANK OF COMMERCE.
19-3-12 SEATTLE, WASH.

Wm D Perkins
PRESIDENT
CASHIER

A3



State Envelopes
By U. J. Curran Pres.
and Eng.
U.S. Pat.

123

WM. D PERKINS & CO., BANKERS 19-52-12

SEATTLE, WASH. JUL 1 1933 № 63190

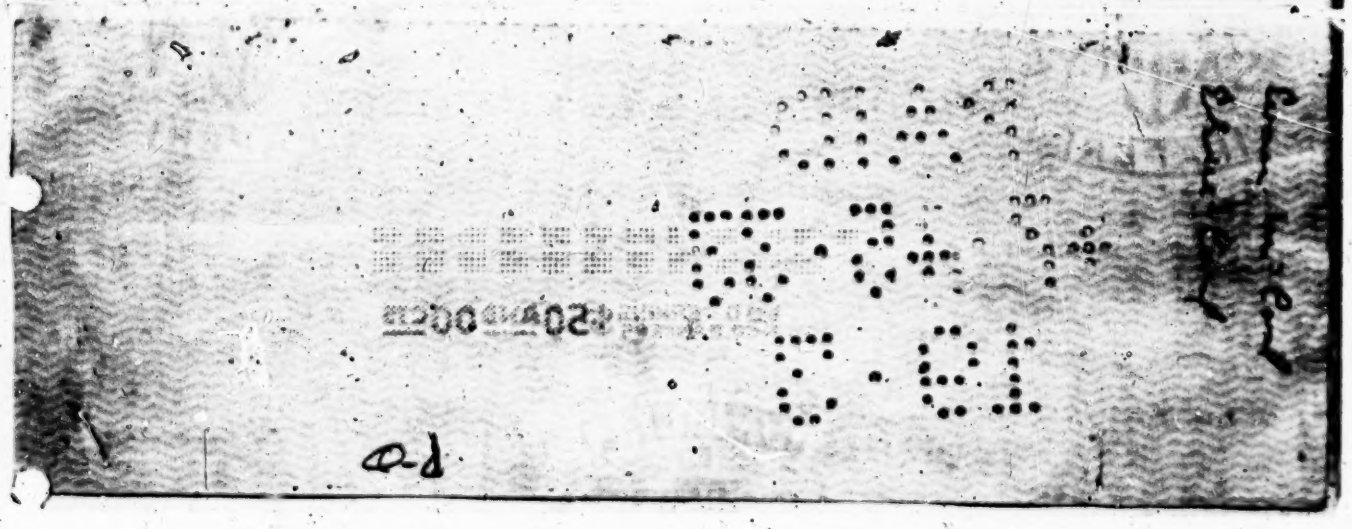
PAY TO THE ORDER OF

$ 50 00

WM D PERKINS & CO. BANKERS $50 AND 00 CTS DOLLARS

To THE NATIONAL BANK OF COMMERCE,
19-3-12 SEATTLE, WASH.

Wm. D. Perkins
PRESIDENT



1-24

$10,025.00
On Demand

July 1 1933

after date value of grace we promise
to pay to the order of Wm. D. Perkins & Co, Bankers
211 Cherry Street, Seattle

Ten thousand twenty five and [illegible] - - -

PETITIONER'S EXHIBIT 17
QUIT CLAIM DEED

The Grantors Russell L. Cooley and Lillian A. Cooley, his wife, for the consideration of one dollar, the receipt whereof is hereby acknowledged, and other valuable consideration, convey..... and quit-claim..... to R. C. Perkins, Trustee for Bondholders Committee, all right, title and interest in and to the following described real estate situated in Seattle, King County, Washington, to-wit:

Lots One (1) and Four (4) and the West 32 feet of Lots Two (2) and Three (3), Block One Hundred Sixteen (116), A. A. Denny's Broadway Addition to the City of Seattle; being that certain real property described in the mortgage from Marlborough Investment Co., a corporation, to the National Bank of Commerce, a corporation, as Trustee, recorded in Volume 1015, Page 45, mortgage records of King County, Washington; together with all personal property, furniture, furnishings, and fixtures attached to or connected with the operation of said property included in said mortgage, and all such property which subsequently became attached to and which is now used in connection with the operation of said building upon the foregoing described real property.

Dated this 30th day of June, 1933.

[Seal] RUSSELL L. COOLEY

[Seal] LILLIAN A. COOLEY

State of Oregon,
County of Multnomah—ss.

I, the undersigned Notary Public, do hereby certify that on this 30th day of June, 1933, personally appeared before me Russell L. Cooley and Lillian A. Cooley to me known to be the individuals described in and who executed the foregoing instrument, and acknowledged that they signed and sealed the same as their free and voluntary act and deed for the uses and purposes therein mentioned.

Given under my hand and official seal the day and year first above written.

[Seal] J. A. McKEEN,
Notary Public in and for the State of Oregon, residing at Portland.

My Commission Expires April 15, 1935. [183]

QUIT CLAIM DEED

The Grantor State Developers, Inc., a corporation, for the consideration of one dollar, the receipt whereof is hereby acknowledged, and other valuable consideration, convey..... and quit-claim..... to R. C. Perkins, Trustee for Bondholders' Committee, all right, title and interest in and to the following described real estate situated in Seattle, King County, Washington, to-wit:

Lots One (1) and Four (4) and the West 32 feet of Lots Two (2) and Three (3), Block

One Hundred Sixteen (116), A. A. Denny's Broadway Addition to the City of Seattle; being that certain real property described in the mortgage from Marlborough Investment Co., a corporation, to the National Bank of Commerce, a corporation, as Trustee, recorded in volume 1015, page 45, mortgage records of King County, Washington; Together With all personal property, furniture, furnishings, and fixtures, attached to or connected with the operation of said property included in said mortgage, and all such property which subsequently became attached to and which is now used in connection with the operation of said building upon the foregoing described real property.

Dated this 1 day of July, 1933.

STATE DEVELOPERS, INC.,

[Seal] By: G. J. GWINN,

President.

[Seal] By: O. H. JONES,

Secretary.

State of Washington,
County of ..... --ss.

I, the undersigned Notary Public, do hereby certify that on this 1 day of July, 1933, personally appeared before me O. H. Jones to me known to be the individual described in and who executed the foregoing instrument, and acknowledged that

.....signed and sealed the same as.....free and voluntary act and deed for the uses and purposes therein mentioned.

Given under my hand and official seal the day and year first above written.

.....

Notary Public in and for the State of Washington, residing at ..... [185]

State of Washington,
County of King—ss.

On this 1 day of July, A. D. 1933, before me, the undersigned Notary Public, personally appeared G. J. GWINN and O. H. Jones to me known to be the President and Secretary of the corporation that executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that They were authorized to execute said instrument and that the seal affixed is the corporate seal of said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year first above written.

[Seal] E. F. [Illegible]
Notary Public in and for the State of Washington, residing at Seattle. [186]

PETITIONER'S EXHIBIT 18

Washington Title Insurance Company

STATUTORY QUIT CLAIM DEED

The Grantor, R. C. Perkins Trustee for Bondholders Committee, for and in consideration of ..... Dollars ($.....) conveys and quit claims to Marlborough House, Inc., a corporation, all interest in the following described real estate, situated in the County of King, State of Washington:

Lots one (1) and four (4) and west thirty-two (32) feet of Lots two (2) and three (3), Block one hundred sixteen (116), A. A. Denny's Broadway Addition to the City of Seattle, together with all personal property, furniture, furnishings and fixtures attached to or connected with the operation of said real estate, and all such property which is now used in connection with the operation of the buildings upon the foregoing described real property.

Dated this 28th day of September, A. D. 1938.

[Seal] R. C. PERKINS,
Trustee for Bondholders Committee.

[Seal] .....

State of Washington,
County of King—ss.

On this day personally appeared before me R. C. Perkins Trustee for Bondholders Committee, to me known to be the individual described in and who executed the within and foregoing instrument and

acknowledged that he signed the same as his free and voluntary act and deed, for the uses and purposes therein mentioned.

Given under my hand and official seal this 28th day of September, 1938.

[Seal] R. B. ALBERTSON,
Notary Public in and for the State of Washington, residing at Seattle.

Filed for Record ..... 19..., ... M. Request of County Auditor. [187].

PETITIONER'S EXHIBIT 19

In the Superior Court of the State of Washington
For the County of King

Cause No. 256215

Judgment rendered on the 3rd day of July, 1933.

State of Washington,
County of King—ss.

THE NATIONAL BANK OF COMMERCE OF SEATTLE, a corporation, as Trustee,

Plaintiff,

vs.

MARLBOROUGH INVESTMENT CO., a corporation; GENERAL PETROLEUM CORP. OF CALIFORNIA, a corporation; F. S. STIMSON COMPANY, (now named Stimson-Moore Company), a corporation; GARDNER J. GWINN, INC., a corporation; LINCOLN SECURITIES, INC., a corporation; STATE DEVELOPERS, INC., a corporation; R. W. DALE and JANE DOE DALE, his wife; W. D. ASKREN and JANE DOE ASKREN, his wife; RUSSELL L. COOLEY and LILLIAN A. COOLEY, his wife; and HILDEGARDE A. DAILEY and EDWARD J. DAILEY, her husband,

Defendants.

State of Washington,
County of King—ss.

CERTIFICATE OF PURCHASE

I, Claude G. Bannick, Sheriff of King County, in the State of Washington, do hereby certify that

under and by virtue of a special execution and order of sale duly issued out of the above entitled Court, in the above entitled action, on the 3rd day of July, 1933, duly attested, and to me directed and delivered, by which I was commanded to sell the property hereinafter described according to law, and apply the proceeds of such sale to the satisfaction of the judgment in said action, amounting to the sum of Five hundred ten thousand six hundred sixty-six and 58/100 ($510,666.58) Dollars, with interest and costs of suit, as by said execution and order of sale (reference thereto being had), more fully appears, I duly levied on and have this day at the hour of ten o'clock A. M., sold at public auction, in the manner prescribed by law, and after due and legal notice to Wm. D. Perkins, W. O. Bulette, T. H. Lovell, who were the highest and best bidders therefor, at such sale, for the sum of Three hundred ten thousand four hundred twenty-five and no/100 ($310,425.00) Dollars, [189] which was the highest sum bid at such sale, the real estate, situated in King County, State of Washington, bounded and described as follows, to-wit:

> Lots 1 and 4, and the West 32 feet of Lots 2 and 3, Block 116, A. A. Denny's Broadway Addition to the City of Seattle, Washington—together with all gas or electric stoves, refrigeration, wall beds, hall carpets and room carpets, lighting fixtures, window shades and fixtures, and furniture of 60 apartments installed

and furniture of all other apartments, halls, lobby and other rooms of the building and the garage adjoining, furnished now or hereafter in the buildings being constructed upon the above described lots, known as Marlborough House, Together with all buildings and improvements now thereon or hereafter to be made or constructed thereon, and all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining and the rents, issues and profits thereof;

That the price paid for each distinct lot and parcel was as follows: .....
and the whole price paid for said real estate was the sum of $310,425.00 and that said property is subject to redemption, pursuant to the statute in such cases made and provided.

Given under my hand this 30th day of September, 1933.

CLAUDE G. BANNICK,
Sheriff of King County, State of Washington.
By L. E. ANDERSON,
Deputy. [191]

Sheriff's Deed issued this 17th day of October, 1934 to Marlborough House, Inc., Assignee, by Claude G. Bannick, Sheriff.

By L. E. ANDERSON,
Deputy.

Deed delivered to: Wm. D. Perkins. 10/18/34.
[190]

ASSIGNMENT

For Value Received, we hereby sell, assign and transfer to Marlborough House, Inc. all our right, title and interest to the within certificate.

Dated October 10th, 1934.

WM. D. PERKINS
W. O. BULETTE
MATTIE BULETTE
T. H. LOVELEE
CORA E. PERKINS

State of Washington,
County of King—ss.

I, the undersigned, a Notary Public in and for the State of Washington, do hereby certify that on this 10th day of October, 1934, personally appeared before me Wm. D. Perkins and Cora E. Perkins, his wife; W. O. Bulette and Mattie Bulette, his wife, and T. H. Lovell, a widower, to me known to be the individuals described in and who executed the within instrument, and acknowledged that they executed the same as their free and voluntary act and deed, for the uses and purposes therein mentioned.

Given under my hand and official seal this 10th day of October, 1934.

[Notarial Seal] O. N. GALER,
Notary Public in and for the State of Washington, residing at Seattle, Wash.

Will call Marlborough House, 1220 Boren Ave. (Wm. D. Perkins) A52008. [192]

[Endorsed]: Received. Claude G. Bannick, Sheriff, King County, Wash. 1934 Oct-16 A. M. 9:48 [189]

[Endorsed]: Filed in County Clerk's Office, King County, Wash., Oct. 20, 1934. Abe N. Olson, Clerk. By S. R. Battenfield, Deputy.

PETITIONER'S EXHIBIT 20

Vol 1604 Page 242

Now, Therefore, the said party of the first part, by virtue of said Decree of said Court, in said Cause No. 258215 and of said special execution and order of sale, and of said order of confirmation and in pursuance of the statute in such cases made and provided, and for and in consideration of said sum of money paid to the Sheriff Claude G. Bannick, as aforesaid, by said purchaser, at said sale, has granted, bargained, sold, conveyed and confirmed, and by these presents does grant, bargain, sell, convey and confirm, unto the said party of the second part, and to its successors and assigns forever, all those certain lots, pieces or parcels of land, situate, lying and being in King County, State of Washington, bounded and described as follows, to-wit:

Lots 1 and 4, and the West 32 feet of Lots 2 and 3, Block 116, A. D. Denny's Broadway Addition to the City of Seattle, Washington—together with all gas or electric stoves, refrigerators, wall beds, hall carpets and room carpets, lighting fixtures,

window shades and fixtures, and furniture of 60 apartments installed and furniture of all other apartments, halls, lobby and other rooms of the building and the garage adjoining, furnished now or hereafter in the buildings being constructed upon the above described lots, known as Marlborough House,

Together with all buildings and improvements now thereon or hereafter to be made or constructed thereon, and all and singular the tenements; hereditaments and appurtenances thereunto belonging or in any wise appertaining and the rents, issues and profits thereof; together with all and singular the tenements, hereditaments and appurtenances thereto belonging.

To Have And To Hold the said premises, with the appurtenances, unto the said party of the second part and to its successors and assigns forever, as fully and absolutely as said sheriff can, may or ought to by virtue of said decree, writ, order of confirmation, and the statute in such cases made and provided, grant, bargain, sell, convey and confirm the same.

In Witness Whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

[Seal] CLAUDE G. BANNICK,
Sheriff of King County, State of Washington.

Signed, Sealed and Delivered in presence of
L. E. ANDERSON
MARY DREW

State of Washington,
County of King—ss.

I, H. E. True, Deputy County Auditor of King County, State of Washington, duly appointed and sworn, residing at Seattle, in said State, do hereby certify that on this 17th day of October, 1934, personally appeared before me Claude G. Bannick, to me known to be the individual described in and who, as Sheriff of King County, State of Washington, executed the foregoing instrument, and acknowledged to me that he signed and sealed said instrument as his free and voluntary act and deed for the uses and purposes therein mentioned.

Given under my hand and official seal this 17th day of October, 1934.

H. E. TRUE,
Deputy County Auditor for King County, Washington, residing at Seattle. [195]
[King County Auditor's Seal]

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2825298

This Indenture, Made the 17th day of October, A. D. 1934, between Claude G. Bannick, as Sheriff of King County, State of Washington, party of the first part, and Marlborough House, Inc., Assignee, the party of the second part:

Witnesseth, That, Whereas, by virtue of an order of sale and special execution issued out of and under the seal of the Superior Court of King County, State of Washington, holding terms at

Seattle, dated the 3rd day of July, 1933, upon a judgment recovered in said Court on the 3rd day of July, 1933, in favor of the plaintiff and against the defendants, in Cause No. 256215, of said Court entitled The National Bank of Commerce of Seattle, a corporation, as Trustee, Plaintiff, vs. Marlborough Investment Co., a corporation; General Petroleum Corp., of California, a corporation; F. S. Stimson Company, (now named Stimson-Moore Company), a corporation; Gardner J. Gwinn, Inc., a corporation; Lincoln Securities, Inc., a corporation; State Developers, Inc., a corporation; R. W. Dale and Jane Doe Dale, his wife; W. D. Askren and Jane Doe Askren, his wife; Russell L. Cooley and Lillian A. Cooley, his wife, and Hildegarde A. Dailey and Edward J. Dailey, her husband, Defendants.

To Claude G. Bannick, Sheriff of King County, Washington, directed and delivered, commanding him to sell the lands hereinafter described, according to law, and apply the proceeds of such sale to the satisfaction of said judgment, said Sheriff duly levied upon and sold pursuant to due and legal notice of sale first given, at public auction on the 30th day of September, 1933, between the hours of 9 o'clock in the morning and 4 o'clock in the afternoon of that day, to-wit: at the hour of Ten o'clock A. M., in front of the Court House door, in the City of Seattle, in King County, State of Washington, all the lands and premises hereinafter de-

scribed, at which sale said lands were struck off and sold to Wm. D. Perkins, W. O. Bulette, T. H. Lovell, for the sum of Three Hundred Ten Thousand Four Hundred Twenty Five and no/100 ($310,425.00) Dollars, lawful money of the United States of America, they being the highest bidders, and said sum of money being the highest and best sum bid therefor. And said Sheriff, after receiving from said purchasers said sum of money so bid, gave to said Wm. D. Perkins, W. O. Bulette, T. H. Lovell, such certificate of purchase as is required by law to be given.

And Whereas, on the 21st day of October, 1933, said Superior Court, by an order duly made and entered of record, confirmed said sale.

The said Certificate of Purchase in the above entitled action was duly assigned for a valuable consideration by Wm. D. Perkins, and Cora E. Perkins, W. O. Bulette and Mattie Bulette; and T. H. Lovell, a widower, to Marlborough House, Inc., on the 10th day of October, 1934. [196]

(I. R. S. $310.50 attached and cancelled)

Filed for record Oct. 19, 1934, 1:19 P. M. Request of Wm. D. Perkins & Co., Bankers.

GEORGE A. GRANT,
County Auditor. [197]

In the United States Circuit Court of Appeals for the Ninth Circuit.

[Title of Cause.]

DESIGNATION OF PORTIONS OF RECORD, PROCEEDINGS AND EVIDENCE TO BE CONTAINED IN RECORD ON REVIEW

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause, in connection with the petition for review by the said Circuit Court of Appeals for the Ninth Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceedings before the Board.

2. Pleadings before the Board;

   (a) Petition, including annexed copy of notice of deficiency and statement attached.

   (b) Amended Petition (omitting copy of notice of deficiency and statement attached).

   (c) Answer to amended petition.

3. Findings of fact and opinion of Board in consolidated proceedings, BTA-Docket Nos. 90452, 90487 and 90486.

4. Decision.

5. Petition for review, together with proof of service of notice of filing petition for review and of service of a copy of petition for review.

6. Statement of Points to be relied on, together with proof of service of notice of filing Statement of Points and of service of a copy of Statement of Points. [199]

7. Stipulation of Venue.

8. Order of Circuit Court of Appeals for the Ninth Circuit consolidating proceedings, etc., with BTA-Docket Nos. 90452 and 90487, (Commissioner v. Marlborough House, Inc.).

9. Consolidated Statement of Evidence and Exhibits attached thereto.

10. All orders of enlargement of time made by the Court with respect to the preparation and transmission of the record on review (not included in record).

11. This Designation of Portions of Record, etc.

Said transcript to be prepared, certified and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

J. P. WENCHEL,
W
Chief Counsel, Bureau of Internal Revenue.

Service of a copy of the within Designation of Portions of Record, etc., is hereby admitted this 1 day of July, 1940.

No objection.

W. Z. KERR,
Attorney for Respondent on Review.

CRM/csl 6/4/40

[Endorsed]: U. S. B. T. A. Filed Aug. 7, 1940.

[200]

[Title of Board and Cause.]

CERTIFICATE

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 200, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 12th day of August, 1940.

[Seal] B. D. GAMBLE,
Clerk, United States Board of Tax Appeals.

[Endorsed]: No. 9602. United States Circuit Court of Appeals for the Ninth Circuit. Commissioner of Internal Revenue, Petitioner, vs. Bondholders Committee, Marlborough Investment Co., First Mortgage Bonds, a corporation, Respondent. Transcript of the Record. Upon Petition to Review a Decision of the United States Board of Tax Appeals.

Filed August 16, 1940.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 9603

United States

Circuit Court of Appeals

For the Ninth Circuit.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

MARLBOROUGH HOUSE, INC., a corporation,
Respondent.

Transcript of the Record

Upon Petition to Review a Decision of the United States Board of Tax Appeals.

APPEARANCES:

For Taxpayer:
HAROLD L. SCOTT, Esq.,
WM. Z. KERR, Esq.

For Comm'r:
J. D. HUGHES, Esq.,
EDWARD C. ADAMS, Esq.

Docket No. 90452.

MARLBOROUGH HOUSE, INC.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1937

Aug. 30—Petition received and filed. Taxpayer notified. (fee paid).

Aug. 30—Copy of petition served on General Counsel.

Oct. 12—Motion to dismiss Rule 5 (e) filed by General Counsel.

Oct. 15—Hearing set Nov. 3, 1937 on motion.

Nov. 1—Amended petition filed.

Nov. 2—Copy of amended petition served on General Counsel.

Nov. 3—Hearing had before Mr. Murdock on motion to dismiss—denied.

1937

Nov. 3—Order denying motion to dismiss and allowing respondent usual time to answer, entered.

Nov. 16—Answer to amended petition filed by General Counsel.

Nov. 27—Notice issued placing proceeding on Seattle, Wash. Calendar. Answer served.

1938

Aug. 1—Hearing set Sept. 19, 1938, Seattle, Washington.

Sept. 29—Hearing had before Mr. Kern on merits. Motion to consolidate dockets 90486, 90487 and 90452 granted. Appearance of Wm. Z. Kerr filed. Petitioner's brief due 10/29/38; respondent's brief due 12/28/38; petitioner's reply 1/12/39.

Oct. 18—Transcript of hearing 9/29/38 filed.

Oct. 27—Brief filed by taxpayer. 10/27/38 copy served on General Counsel.

1939

Jan. 27—Motion for leave to file the attached brief, brief lodged, filed by General Counsel. 1/28/39 granted.

Feb. 27—Motion for leave to file the attached reply brief, reply brief lodged, filed by taxpayer. 3/1/39 granted.

Mar. 2—Copy of motion and reply brief served on General Counsel.

1939

Nov. 9—Findings of fact and opinion rendered, John W. Kern, Div. 16. Decision will be entered under Rule 50.

1940

Feb. 17—Agreed computation of deficiency filed.

Feb. 26—Decision entered, John W. Kern, Div. 16.

[1*]

1940

May 13—Petition for review by United States Circuit Court of Appeals, Ninth Circuit, with assignments of error filed by General Counsel.

May 22—Proof of service filed by General Counsel. (3).

June 14—Certified copy of an order from the 9th Circuit extending the time to July 31, 1940, to complete and transmit the record, filed.

July 15—Order from the 9th Circuit, consolidating dockets 90452, 90486 and 90487, for record, briefing, hearing and decision; that there shall be but one consolidated statement of evidence; that a complete transcript of record in docket 90486 only and the abbreviated record in dockets 90452 and 90487 be printed under one cover; that there shall be no duplication of documents in the consolidated record as printed; and that the reviews shall have the same force

*Page numbering appearing at foot of page of original certified Transcript of Record.

1940

and effect as if a separate record had been filed in each case, filed.

July 19—Certified copy of an order from the 9th Circuit, extending the time to Sept. 15, 1940, to complete and transmit the record, filed.

Aug. 7—Agreed consolidated statement of evidence filed.

Aug. 7—Statement of points filed by General Counsel—proof of service thereon.

Aug. 7—Designation of portion of record filed by General Counsel—agreed to and proof of service thereon. [2]

APPEARANCES:

For Taxpayer:
HAROLD L. SCOTT,
WM. Z. KERR, Esq.

For Comm'r:
J. D. HUGHES, Esq.,
EDWARD C. ADAMS.

Docket No. 90487

MARLBOROUGH HOUSE, INC.,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES

1937

Sept. 1—Petition received and filed. Taxpayer notified. (Fee paid).

Sept. 1—Copy of petition served on General Counsel.

Oct. 12—Motion to dismiss (Rule 5 (e), filed by General Counsel.

Oct. 15—Hearing set Nov. 3, 1937 on motion.

Nov. 1—Amended petition filed. 11/2/37 copy served.

Nov. 3—Hearing had before Mr. Murdock on motion to dismiss, denied.

Nov. 3—Order denying motion to dismiss and allowing respondent usual time to answer, entered.

Nov. 16—Answer to amended petition filed by General Counsel.

Nov. 27—Notice issued placing proceeding on Seattle, Washington Calendar. Copy of answer served.

1938

Aug. 1—Hearing set Sept. 19, 1939, Seattle, Washington.

1938

Sept. 29—Hearing had before Mr. Kern on merits. Motion to consolidate dockets 90486, 90487 and 90452, granted. Submitted. Entry of appearance of Wm. Z. Kerr, filed. Petitioner's brief due 10/29/38; respondent's brief 12/28/38; petitioner's reply 1/12/39.

Oct. 18—Transcript of hearing 9/29/38 filed.

Oct. 27—Brief filed by taxpayer. 10/27/38 copy served on General Counsel.

1939

Jan. 27—Motion for leave to file the attached brief, brief lodged, filed by General Counsel. 1/28/39 granted.

Feb. 27—Motion for leave to file the attached reply brief, reply brief lodged, filed by taxpayer. 3/1/39 granted.

Mar. 2—Copy of motion and reply brief served on General Counsel.

Nov. 9—Findings of fact and opinion rendered, John W. Kern, Div. 16. Decision will be entered under Rule 50.

1940

Feb. 17—Agreed computation of deficiency filed.

Feb. 26—Decision entered, John W. Kern, Div. 16.

[3]

May 13—Petition for review by United States Circuit Court of Appeals, 9th Circuit, with assignments of error filed by General Counsel.

1940

May 22—Proof of service filed by General Counsel. (3).

June 14—Certified copy of an order from the 9th Circuit extending the time to July 31, 1940, to complete and transmit the record, filed.

July 15—Order from the 9th Circuit, consolidating dockets 90452, 90486 and 90487, for record, briefing, hearing and decision; that there shall be but one consolidated statement of evidence; that a complete transcript of record in docket 90486 only and the abbreviated record in dockets 90452 and 90487 be printed under one cover; that there shall be no duplication of documents in the consolidated record as printed; and that the reviews shall have the same force and effect as if a separate record had been filed in each case, filed.

July 19—Certified copy of order from the 9th Circuit, extending the time to September 15, 1940, to complete and transmit the record, filed.

Aug. 7—Agreed consolidated statement of evidence filed.

Aug. 7—Statement of points filed by General Counsel—proof of service thereon.

Aug. 7—Designation of portions of record filed by General Counsel—agreed to and proof of service thereon. [4]

Docket No. 90452

Appeal of:
Marlborough House, Inc.
211 Cherry Street
Seattle, Washington,

PETITION

The above named taxpayer hereby appeals from the determination of the Commissioner of Internal Revenue set forth in his deficiency letter IT:E:3, JTA:90D, dated June 3, 1937, and as the basis of its appeal sets forth the following:

Jurisdiction of the Board

1. The taxpayer is a corporation organized under the laws of the State of Washington, with its principal office at 211 Cherry Street, Seattle, Washington.

2. The deficiency letter (copy of which is attached) was mailed to the taxpayer June 3, 1937 and states a deficiency for the year 1934 in the amount of Four Hundred Forty-one Dollars and seventy-six Cents ($441.76), and for the year 1935 a deficiency in the amount of Eleven Hundred Twenty Dollars and thirty-five ($1,120.35) a total deficiency of Fifteen Hundred Sixty-two Dollars and eleven Cents ($1,562.11).

3. The taxes in controversy are income taxes for the calendar year 1934 in the amount of Four Hundred Forty-one Dollars and seventy-six Cents ($441.76) and are less than $10,000.00, to-wit: Four Hundred Forty-one Dollars and seventy-six Cents

($441.76); and income taxes for the calendar year 1935 in the amount of Eleven Hundred Twenty Dollars and thirty-five Cents ($1,120.35), and are less than $10,000.00, to-wit: Eleven Hundred Twenty Dollars and thirty-five Cents ($1,120.35), a total tax of Fifteen Hundred Sixty-two Dollars and eleven Cents ($1,562.11) for the years 1934 and 1935.

Assignments of Error

4. The determination of tax contained in the said deficiency letter is based upon the following:

[5]

That the Commissioner of Internal Revenue errored in decreasing the amount of depreciation allowable for the year 1934 in the amount of $3,212.78, and for the year 1935 the Commissioner errored in not allowing as a deduction, depreciation of the amount of $11,870.39.

Statement of Facts

5. That the facts upon which the taxpayer relies as the basis of its appeal are as follows:

That for the years 1934 and 1935, the Commissioner has not allowed reasonable depreciation computed on the basis of cost for the years 1934 nor 1935. Furthermore, he has overstated the remaining life of the assets.

Wherefore, Petitioner prays that the Board may hear and determine its appeal and the petitioner further prays that the Board may give and grant such other and further relief as in the premises the Board may deem fit and proper, and if the Board

should find that the petitioner has overpaid its taxes for the years under review the Board may order and direct refund of said taxes overpaid with interest thereon.

HAROLD L. SCOTT
500 Insurance Building
Seattle, Washington
Counsel for Taxpayer [6]

State of Washington
County of King—ss.

I, R. C. Perkins, being first duly sworn, says he is the Secretary of Marlborough House, Inc., a corporation organized under the laws of the State of Washington, and the taxpayer named in the foregoing petition, and as such is duly authorized to verify the foregoing petition, and is familiar with the statements therein contained, and that the facts therein stated are true.

R. C. PERKINS

Subscribed and sworn to before me this 27th day of August, 1937.

[Seal] H. O. EVANSON
Notary Public in and for the State of Washington, residing at Seattle. [7]

Commission expires May 6, 1941.

Treasury Department
Washington, D. C.

June 3, 1937

Marlborough House, Inc.,
211 Cherry Street,
Seattle, Washington.

Sirs:

You are advised that the determination of your income tax liability for the taxable year(s) ended December 31, 1934 and 1935 discloses a deficiency of $1,562.11 as shown in the statement attached.

In accordance with section 272(a) of the Revenue Act of 1934, notice is hereby given of the deficiency mentioned. Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:CI:P-7. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period

terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,
Commissioner.

By CHAS. T. RUSSELL,
Deputy Commissioner.

Enclosures:
Statement
Form 870
Exhibits A and B [8]

STATEMENT

IT:E:3
JTA:90D
In re: Marlborough House, Inc.,
211 Cherry Street,
Seattle, Washington.

Tax Liability for Taxable Year Ended December 31, 1934 and 1935

Income Tax	Liability	Assessed	Deficiency
1934	$1,532.44	$1,090.68	$ 441.76
1935	$1,120.35	None	$1,120.35

The records of this office indicate that no reply has been received to letter dated March 11, 1937 advising you of the approval of the report submitted by the internal revenue agent in charge at Seattle, Washington, for the years 1934 and 1935, copies of which were transmitted to you.

Net taxable income for the year 1934 is computed as follows:

Net income reported on return	$ 7,932.25
Add:	
1. Depreciation overstated	3,212.78
Net income as adjusted	$11,145.03

Explanation of Changes

1. This item represents a disallowance of excessive depreciation; the adjustments are shown in exhibit A attached hereto and made a part of this statement. Reference; section 23 (L) of the Revenue Act of 1934. [9]

Computation of Income Tax

Net income as adjusted	$11,145.03
Tax at 13¾%	$ 1,532.44
Tax previously assessed, serial #401323	1,090.68
Deficiency, income tax	$ 441.76

Net taxable income for the year 1935 is computed as follows:

Net loss reported on return	$ 3,722.40
Add:	
1. Depreciation overstated	11,870.39
Net income as adjusted	$ 8,147.99

Explanation of Changes

1. Depreciation disallowed; the adjustments are shown in exhibit B attached hereto and made a part of this statement. Reference; section 23 (L) of the Revenue Act of 1934.

Computation of Income Tax.

Net income as adjusted	$ 8,147.99
Tax at 13¾%	$ 1,120.35
Tax previously assessed, serial #854852	None
Deficiency, income tax	$ 1,120.35

A copy of this letter, together with a copy of the statement and exhibits has been mailed to your representative, Mr. H. L. Scott, 305 Insurance Building, Seattle, Washington, in accordance with the authority contained in the power of attorney executed by you and on file with the Bureau. [10]

Marlborough House, Inc.

EXHIBIT A
Depreciation Schedule
1934

Year Acquired	Original Cost	Depreciation Allowed or Allowable 12/31/33	Undepreciated Balance 12/31/33	Estimated Remaining Life	Rate on Cost	Depreciation Allowed 1934	Depreciation Reserve 12/31/34
Building:							
9/30/33	$288,620.54	$1,603.45	$287,017.09	44¾ yrs.	2,222 plus %	$ 6,413.79	$ 8,017.24
12/31/33	51.00		51.00	44¾ yrs.	2.235 plus %	1.14	1.14
	$288,671.54	$1,603.45	$287,068.09			$ 6,414.93	$ 8,018.38
Furniture and Equipment:							
9/30/33	$ 43,827.57	$1,217.43	$ 42,610.14	8¾ yrs.	11.111 plus %	$ 4,863.73	$ 6,087.16
12/31/33	60.00		60.00	15 yrs.	6⅔%	4.00	4.00
	$ 43,887.57	$1,217.43	$ 42,670.14				
1934	846.83		846.83	15 yrs.	6⅔% (½)	28.23	28.23
	$ 44,734.40	$1,217.43	$ 43,516.97			$ 4,901.96	$ 6,119.39
Totals	$333,405.94	$2,820.88	$330,585.06			$11,316.89	$14,137.77
					Depreciation claimed	14,529.67	
					Depreciation disallowed	$ 3,212.78	

The above depreciation has been computed on basis and at rates established in revenue agent's report for 1933.

[11]

Marlborough House, Inc.

EXHIBIT B

Depreciation Schedule

1935

Year Acquired	Original Cost	Depreciation Allowed or Allowable 12/31/34	Undepreciated Balance 12/31/34	Estimated Remaining Life	Rate on Cost	Depreciation Allowed 1935	Depreciation Reserve 12/31/35
Building:							
9/30/33	$288,620.54	$8,017.24	$280,603.30	43¾ yrs.	2.222 plus %	$ 6,413.79	$14,431.03
12/31/33	51.00	1.14	49.86	43¾ yrs.	2.235 plus %	1.14	2.28
	$288,671.54	$8,018.38	$280,653.16			$6,414.93	$14,433.31
Furniture and Equipment:							
9/30/33	$ 43,827.57	$6,087.16	$ 37,740.41	7¾ yrs.	11.111 plus %	$ 4,869.73	$10,956.89
12/31/33	60.00	4.00	56.00	14 yrs.	6⅔%	4.00	8.00
1934	846.83	28.23	818.60	14½ yrs.	6⅔%	56.46	84.69
	$ 44,734.40	$6,119.39	$ 38,615.01				
1935	2,779.82		2,779.82	15 yrs.	6⅔% (½)	92.66	92.66
	$ 47,514.22	$6,119.39	$ 41,394.83			$ 5,022.85	$11,142.24
Totals	$336,185.76	$14,137.77	$322,047.99			$11,437.78	$25,575.55
						$11,437.78	
			Depreciation claimed			23,308.17	
			Depreciation disallowed			$11,870.39	

The above depreciation has been computed in accordance with the basis and rates established in

[Endorsed]: U.S.B.T.A. Filed Aug. 3, 1937. [12]

United States Board of Tax Appeals

MARLBOROUGH HOUSE, INC., 211 Cherry Street, Seattle, Washington,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Docket No. 90452

AMENDED PETITION

The above named taxpayer hereby appeals from the determination of the Commissioner of Internal Revenue set forth in his deficiency letter IT:E:3, JTA:90D, dated June 3, 1937, and as the basis of its appeal sets forth the following:

Jurisdiction of the Board

1. The taxpayer is a corporation organized under the laws of the State of Washington, with its principal office at 211 Cherry Street, Seattle, Washington.

2. The deficiency letter (copy of which is attached) was mailed to the taxpayer June 3, 1937, and states a deficiency for the year 1934 in the amount of Four Hundred Forty-one Dollars and Seventy-Six Cents ($441.76), and for the year 1933 a deficiency in the amount of Eleven Hundred Twenty Dollars and Thirty-Five Cents ($1,120.35)

a total deficiency of Fifteen Hundred Sixty-two Dollars and eleven Cents. ($1562.11).

3. The taxes in controversy are income taxes for the calendar year 1934 in the amount of Four Hundred Forty-one Dollars and Seventy-six Cents ($441.76) and are less than $10,000.00, to-wit: Four Hundred Forty-one Dollars and Seventy-six Cents ($441.76); and income taxes for the calendar year 1935 in the amount of Eleven Hundred Twenty Dollars and thirty-five Cents ($1,120.35), and are less than $10,000.00, to-wit; Eleven Hundred Dollars and thirty-five Cents ($1,120.35), a total tax of Fifteen Hundred Sixty-two Dollars and eleven Cents ($1,562.11) for the years 1934 and 1935.

Assignments of Error

4. The determination of tax contained in the said deficiency letter is based upon the following:

[13]

(a) That depreciation should be allowed upon basis of cost of the Marlborough Apartment House building in the amount of Three Hundred Seventy-Nine Thousand, Forty-Five Dollars and Sixty-Seven Cents, ($379,045.67), and furthermore that the remaining useful life of the apartment house building is not to exceed thirty years.

(b) Furthermore, that depreciation should be allowed on furniture and equipment costing Fifty-Seven Thousand, Five Hundred Thirty-Nine Dollars and Sixty-one Cents, ($57,539.61), with the remaining useful life of 4 2/3 years.

Statement of Facts

5. The facts upon which the petitioner relies as a basis of this proceeding are as follows:

(a) That during the taxable period the corporation acquired an apartment house known as the Marlborough House, located in Seattle, Washington, from a group of bondholders who had acquired the property through an act of foreclosure on their bond issue.

(b) That the cost of the bonds to the bondholders was Four Hundred Forty-One Thousand Dollars, ($441,000.00).

(c) That the bondholders exchanged their bonds for stock of an equal par value.

(d) Furthermore that the remaining useful life of the apartment house is not to exceed thirty years from the date of acquisition, and that the remaining useful life of the furniture and equipment is not to exceed more than 4 2/3 years.

Wherefore, Petitioner prays that the Board may hear and determine its appeal and the petitioner further prays that the Board may give and grant such other and further relief as in the premises the Board may deem fit and proper, and if the Board should find that the petitioner has overpaid its taxes for the years under review, the Board may order and direct refund of said taxes overpaid with interest thereon.

HAROLD L. SCOTT,

500 Insurance Building, Seattle, Washington, Counsel for Taxpayer. [14]

State of Washington,
County of King—ss.

I, R. C. Perkins, being first duly sworn, on oath, says he is the Secretary of Marlborough House, Inc., a corporation organized under the laws of the State of Washington, and the taxpayer named in the foregoing petition, and as such is duly authorized to verify the foregoing petition, and is familiar with the statements therein contained, and that the facts therein stated are true.

R. C. PERKINS,

Subscribed and sworn to before me this 30th day of October, 1937.

[Seal] O. N. GALER,
Notary Public in and for the State of Washington, residing at Seattle.

For Exhibit "A" See Exhibit "A" attached to Petition. [15]

[Title of Board and Cause—Docket No. 90452.]

ANSWER TO AMENDED PETITION

Comes now the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the amended petition filed herein, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the amended petition.

2. Admits the allegations contained in paragraph 2 of the amended petition.

3. Admits that the taxes in controversy are income taxes for the calendar year 1934, but denies the remaining allegations contained in paragraph 3 of the amended petition.

4. Denies that the respondent committed error as alleged in subparagraphs (a) and (b) of paragraph 4 of the amended petition.

5. Denies the allegations contained in subparagraphs (a) (b), (c) and (d) of paragraph 5 of the amended petition. [16]

Denies generally and specifically each and every allegation contained in the amended petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that petitioner's appeal be denied:

(Signed) J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:
CHESTER A. GWINN,
JOE D. HUGHES,
Special Attorneys,
Bureau of Internal Revenue.
JH/HNP11-15-37

[Endorsed]: U.S.B.T.A. Filed Nov. 16, 1937. [17]

Docket No. 90487

Appeal of:

Marlborough House, Inc.
211 Cherry Street
Seattle, Washington

PETITION

The above named taxpayer hereby appeals from the determination of the Commissioner of Internal Revenue set forth in his deficiency letter IT:E:4, GMC:90D, dated June 9, 1937, and as the basis of its appeal sets forth the following:

Jurisdiction of the Board

1. The taxpayer is a corporation organized under the laws of the State of Washington, with its principal office at 211 Cherry Street, Seattle, Washington.

2 The deficiency letter (copy of which is attached) was mailed to the taxpayer June 9, 1937 and states a deficiency for the year 1933 in the amount of Two Hundred Forty-five Dollars and thirty-three Cents ($245.33).

3. The tax in controversy is income tax for the calendar year 1933 in the amount of Two Hundred Forty-five Dollars and thirty-three Cents ($245.33) and is less than $10,000.00, to-wit: Two Hundred Forty-five Dollars and thirty-three Cents ($245.33).

Assignments of Error

4. The determination of tax contained in the said deficiency letter is based upon the following:

That the Commissioner of Internal Revenue errored in decreasing the amount of depreciation allowable for the year 1933 in the amount of $1,588.74. Furthermore, the Commissioner has failed to allow accrued taxes in the amount of $1,697.27.

Statement of Facts

5. That the facts upon which the taxpayer relies as the basis of its appeal are as follows: [18]

That for the year 1933, the Commissioner has not allowed reasonable depreciation computed on the basis of cost for the period in 1933. Furthermore, the remaining life of the assets has been overstated. No real or personal property taxes have been allowed for the period in 1933.

Wherefore, Petitioner prays that the Board may hear and determine its appeal and the petitioner further prays that the Board may give and grant such other and further relief as in the premises the Board may deem fit and proper, and if the Board should find that the petitioner has overpaid its taxes for the years under review the Board may order and direct refund of said taxes overpaid with interest thereon.

HAROLD L. SCOTT,

500 Insurance Building, Seattle, Washington, Counsel for Taxpayer. [19]

State of Washington,
County of King—ss.

I, R. C. Perkins, being first duly sworn, says he is the Secretary of Marlborough House, Inc., a cor-

poration organized under the laws of the State of Washington, and the taxpayer named in the foregoing petition, and as such is duly authorized to verify the foregoing petition, and is familiar with the statements therein contained, and that the facts therein stated are true.

R. C. PERKINS

Subscribed and sworn to before me this 27th day of August, 1937.

[Seal] H. O. EVANSON,
Notary Public in and for the State of Washington, residing at Seattle. [20]

Treasury Department
Washington, D. C.

June 9, 1937.

Marlborough House, Inc.
211 Cherry Street
Seattle, Washington

Sirs:

You are advised that the determination of your income tax liability for the taxable year(s) 1933 discloses a deficiency of $245.33 as shown in the statement attached.

In accordance with section 272 (a) of the Revenue Act of 1932, as amended by section 501 of the Revenue Act of 1934, notice is hereby given of the deficiency mentioned. Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of

the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P:7. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,
Commissioner.

By CHAS. T. RUSSELL,
Deputy Commisssioner.

Enclosures:
Statement
Form 870
Exhibit A [21]

STATEMENT

IT:E:4
GMC:90D

In re: Marlborough House, Inc.
211 Cherry Street
Seattle, Washington

Income Tax Liability

Year—1933.
Income Tax Liability—$256.12.
Income Tax Assessed—$ 0.79.
Deficiency—$245.33.

The deficiency shown herein is based upon the report dated November 29, 1935, prepared by Revenue Agent Norman E. Black, a copy of which was transmitted to you.

Careful consideration has been accorded your protest dated January 7, 1936 in connection with findings of the examining officer, and the information submitted at a conference held in the office of the internal revenue agent in charge.

This office is in accord with the findings of the revenue agent.

Net income reported on your return		$ 78.48
Additions:		
1. Taxes accrued, November 1 to December 31	$1,697.27	
2. Excess depreciation, November 1 to December 31	1,588.74	3,286.01
Total		$3,364.49
Deductions:		
3. Income for period prior to incorporation		570.41
Total net income, November 1, to December 31, 1933		$2,794.08
Less:		
4. One-third taxable to transferor		931.36
Adjusted net income		$1,862.72

[22]

Computation of Tax

Net income	$1,862.72
Income tax at 13¾ percent on $1,862.72	$ 256.12
Corrected income tax liability	$ 256.12
Income tax assessed:	
Original, account #401343	$ 10.79
Deficiency of income tax	$ 245.33

Explanation of Items Changed

1. Represents disallowance of deduction for taxes accrued. The deduction is for one-sixth of real estate and personal property taxes for the year 1933 on the basis that one-twelfth thereof accrued in each month of the period from November 1, 1933 to December 31, 1933.

The deduction is disallowed under authority of General Counsel's Memorandum #6667, appearing in Internal Revenue Cumulative Bulletin VIII-2 December 1929, page 94 wherein it is held that these taxes accrued on March 1, 1933, prior to the date of acquisition by you. The amount of taxes disallowed, $1,697.27, represents a portion of the cost basis of the assets.

2. Represents excessive depreciation disallowed.

Depreciation claimed for period November 1, 1933 to December 31, 1933	$3,469.33
Depreciation allowed per Exhibit 3, attached	1,880.59
Depreciation disallowed	$1,588.74

3. Represents income for period July 1, 1933 to October 31, 1933 of bondholders committee, transferor of your property. Under General Counsel's Memorandum #1122 appearing in Internal Revenue Cumulative Bulletin VI-1, page 256, income for period prior to the organziation of a taxpayer is not income to such taxpayer.

4. Represents one-third of net income of $2,794.08 for period from November 1, to December 31, 1933 which is transferred to transferor's net income. It appears that transferor operated property from July 1, to November 20, 1933, therefore, the income from November 1, to November 20, 1933, or $931.36, (one-third of $2,794.08) is taxable to transferor. [23]

The records of this office indicate that no reply has been received to letter dated October 12, 1936, advising you of the approval of the report submitted by the internal revenue agent in charge at Seattle, Washington, a copy of which was transmitted to you.

A copy of this letter has been mailed to your representative, Mr. H. L. Scott, 305 Insurance Building, Seattle, Washington, in accordance with the authority contained in the power of attorney executed by you and on file with the Bureau. [24]

EXHIBIT A

Depreciation Schedule

Period October 1, 1933 to December 31, 1933.

Property acquired November 1, 1933 from Bondholders Committee of Marlborough Investment Company First Mortgage Bonds in exchange for capital stock of Marlborough House, Inc.

Building: Marlborough Apartment Hotel. Constructed in 1927-1928. Acquired by transferor at sheriff's sale September 30, 1933. Estimated remaining life, September 30, 1933, 45 years.

	Cost to Transferor	Amended Reserve to Transferor	Depreciation November 1, to December 31, inclusive, 2 months	Cumulative
Cost to transferor	$288,620.54	$534.48	$1,608.97	$1,603.45
Additional cost, taxpayer December 31	51.00			
	$288,671.54			
Furniture and Equipment: Acquired same as building. Estimated remaining composite life, 9 years.				
Cost to transferor	$ 43,827.57	$405.81	$ 811.62	$1,217.43
Addition by taxpayer, December 31	60.00			
	$43,887.57	$940.29	$1,880.59	$2,820.88

[Endorsed]: U. S. B. T. A. Filed Sept. 1, 1937: [25]

EXHIBIT B

[Title of Board and Cause—Docket No. 90487.]

AMENDED PETITION

The above named taxpayer hereby appeals from the determination of the Commissioner of Internal Revenue set forth in his deficiency letter IT:E:4, CMC:90D, dated June 9, 1937, and as the basis of its appeal sets forth the following:

Jurisdiction of the Board

1. The taxpayer is a corporation organized under the laws of the State of Washington, with its principal office at 211 Cherry Street, Seattle, Washington.

2. The deficiency letter (copy of which is attached) was mailed to the taxpayer June 9th, 1937 and states a deficiency for the year 1933 in the amount of Two Hundred Forty-five Dollars and thirty-three cents, ($245.33.)

3. The tax in controversy is income tax for the calendar year 1933 in the amount of Two Hundred Forty-five Dollars and Thirty-Three Cents ($245.33) and is less than $10,000.00, to-wit: Two Hundred Forty-Five Dollars and thirty-three Cents ($245.33).

Assignment of Error

4. The determination of the tax set forth in the said notice of deficiency is based upon the following errors:

(a) That depreciation should be allowed upon basis of cost of the Marlborough Apartment House building in the amount of Three Hundred Seventy-Nine Thousand, Forty-Five Dollars and Sixty-Seven Cents, ($379,045.67), and furthermore that the remaining useful life of the apartment house building is not to exceed thirty years. [26]

(b) Furthermore that depreciation should be allowed on furniture and equipment costing Fifty Seven Thousand, Five Hundred Thirty-Nine Dollars and Sicty-one Cents, ($57,539.61), with the remaining useful life of 4 2/3 years.

(c) That no deduction has been allowed for real and personal property taxes accrued during the taxable period.

Statement of Facts

5. The facts upon which the petitioner relies as a basis of this proceeding are as follows:

(a) That during the taxable period the corporation acquired an apartment house known as the Marlborough House, located in Seattle, Washington, from a group of bondholders who had acquired the property through an act of foreclosure on their bond issue.

(b) That the cost of the bonds to the bondholders was Four Hundred Forty-One Thousand Dollars, ($441,000.00).

(c) That the bondholders exchanged their bonds for stock of an equal par value.

(d) Furthermore that the remaining useful life of the apartment house is not to exceed thirty years from the date of acquisition, and that the remaining useful life of the furniture and equipment is not to exceed more than 4 2/3 years.

(e) That King County, Washington, assessed against real and personal property taxes for the year 1933, and these taxes are operating expenses.

Wherefore, Petitioner prays that the Board may hear and determine its appeal and the petitioner further prays that the Board may give and grant such other and further relief as in the premises the Board may deem fit and proper, and if the Board should find that the petitioner has overpaid its taxes for the years under review, the Board may

order and direct refund of said taxes overpaid with interest thereon.

HAROLD L. SCOTT,
500 Insurance Building,
Seattle, Washington,
Counsel for Taxpayer. [27]

State of Washington,
County of King—ss.

I, R. C. Perkins, being first duly sworn, says he is the Secretary of Marlborough House, Inc., a corporation organized under the laws of the State of Washington, and the taxpayer named in the foregoing petition, and as such is duly authorized to verify the foregoing petition, and is familiar with the statements therein contained, and that the facts therein stated are true.

R. C. PERKINS

Subscribed and sworn to before me this 30th day of October, 1937.

[Seal] O. N. GALER,
Notary Public in and for the State of Washington, residing at Seattle.

For Exhibit "A" See Exhibit "A" attached to Petition.

[Endorsed]: U. S. B. T. A. Filed Nov. 1, 1937.

[28]

[Title of Board and Cause—Docket No. 90487.]

ANSWER TO AMENDED PETITION

Comes now the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the amended petition filed herein, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the amended petition.

2. Admits the allegations contained in paragraph 2 of the amended petition.

3. Admits that the tax in controversy is income tax for the calendar year 1933, but denies the remaining allegations contained in paragraph 3 of the amended petition.

4. Denies that the respondent committed error as alleged in subparagraphs (a), (b) and (c) of paragraph 4 of the amended petition, and denies the allegations of fact contained therein.

5 (a). Admits the allegations contained in subparagraph (a) of paragraph 5 of the amended petition. [29]

5 (b), (c), (d), (e). Denies the allegations contained in subparagraphs (b) to (e), inclusive, of paragraph 5 of the amended petition.

Denies generally and specifically each and every allegation contained in the amended petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that petitioner's appeal be denied.

(Signed) J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue.

Of Counsel:

CHESTER A. GWINN,
JOE D. HUGHES,

Special Attorneys, Bureau of Internal Revenue.

JH/HNP 11-15-37

[Endorsed]: U. S. B. T. A. Filed Nov. 16, 1937.

[30]

United States Board of Tax Appeals
Washington

Docket No. 90452

MARLBOROUGH HOUSE, INC.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the Findings of Fact and Opinion of the Board promulgated November 9, 1939, the parties herein having on February 17, 1940, filed an agreed recomputation, now therefore, it is

Ordered and Decided: That there is an overpayment in income tax for the year 1934 in the amount of $1,090.68 which was paid within three years before the filing of the petition; (Section

809 (a), Revenue Act of 1938), and that there is no deficiency in income tax for the year 1935.

Enter:

[Seal] (s) JOHN W. KERN,

Member.

Entered February 26, 1940. [31]

United States Board of Tax Appeals
Washington

Docket No. 90487

MARLBOROUGH HOUSE, INC.,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the Findings of Fact and Opinion of the Board promulgated November 9, 1939, the parties herein having on February 17, 1940, filed an agreed recomputation, now therefore, it is

Ordered and Decided: That there is an overpayment in income tax for the taxable period November 21 to December 31, 1933, (1933) in the amount of $10.79, no part of which was paid within two years before the filing of the petition. (Section 809 (c), Revenue Act of 1938).

Enter:

[Seal] (Signed) JOHN W. KERN,

Member.

Entered Feb. 26, 1940. [32]

In the United States Circuit Court of Appeals for the Ninth Circuit

[Title of Cause—Docket Nos. 90487 & 90452.]

PETITION FOR REVIEW AND ASSIGNMENTS OF ERROR

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Now Comes Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys, Samuel O. Clark, Jr., Assistant Attorney General, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and Claude R. Marshall, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I.

Jurisdiction

That the petitioner on review (hereinafter referred to as the Commissioner) is the duly appointed, qualified and acting Commissioner of Internal Revenue, appointed and holding his office by virtue of the laws of the United States; that the respondent on review (hereinafter called the taxpayer) is a corporation organized under the laws of the State of Washington on or about November 10, 1933, with its principal office and place of business located at Seattle, Washington; that the said taxpayer filed its Federal income tax returns for the taxable years 1933, 1934 and 1935, in the office of the Collector of Internal [33] Revenue for the District of Washington, located at Seattle, Wash-

ington, which said collection district is within the jurisdiction of the United States Circuit Court of Appeals for the Ninth Circuit, wherein this review is sought.

The Commissioner seeks a review of the decision of the United States Board of Tax Appeals by virtue of the provisions of Sections 1141 and 1142 of the United States Internal Revenue Code.

II.

Prior Proceedings

On June 9, 1937, the Commissioner, in accordance with Section 272(a) of the Revenue Act of 1932, as amended by Section 501 of the Revenue Act of 1934, advised the taxpayer by registered mail that the determination of its income tax liability for the taxable year 1933 (November 21 to December 31, 1733), disclosed a deficiency in tax of $245.33. Thereafter, on September 1, 1937, the taxpayer filed an appeal from said notice of deficiency with the United States Board of Tax Appeals, which was assigned Docket No. 90487. The Commissioner having filed on October 12, 1937 a motion to dismiss the petition for noncompliance with the Rules of the Board of Tax Appeals, the taxpayer on November 1, 1937 filed an amended petition. The Commissioner filed his answer to the amended petition on November 16, 1937.

On June 3, 1937, the Commissioner, in accordance with Section 272(a) of the Revenue Act of 1934, advised the taxpayer by registered mail that the

determination of its income tax liability for the taxable years ended December 31, 1934 and 1935, disclosed deficiencies in tax in the respective [34] amounts of $441.76 and $1,120.35. Thereafter, on August 30, 1937, the taxpayer filed an appeal from said notice of deficiency with the United States Board of Tax Appeals, which was assigned Docket No. 90452. The Commissioner having filed on October 12, 1937 a motion to dismiss the petition for noncompliance with the Rules of the Board of Tax Appeals, the taxpayer on November 4, 1937 filed an amended petition. The Commissioner filed his answer to the amended petition on November 16, 1937.

The cases were called for hearing before a Division of the Board of Tax Appeals at Seattle, Washington, on September 29, 1938, and upon motion were consolidated for hearing and decision with the case of Bondholders Committee, Marlborough Investment Company, First Mortgage Bonds, B. T. A. Docket No. 90486. On November 9, 1939, the Board of Tax Appeals promulgated its consolidated findings of fact and opinion, and on February 26, 1940, entered its respective decisions, finding in Docket No. 90487 an overpayment in income tax for the taxable period November 21 to December 31, 1933 (1933) in the amount of $10.79, (no part of which was paid within two years before the filing of the petition—Section 809(c), Revenue Act of 1938); and finding in Docket No. 90452 that there is an overpayment in income tax for the year 1934 in

the amount of $1,090.68, which was paid within three years before the filing of the petition (Section 809(a), Revenue Act of 1938), and that there is no deficiency in income tax for the year 1935. [35]

III.

Nature of Controversy

Under date of May 20, 1927, the Marlborough Investment Co., a corporation, issued its bonds in the aggregate principal sum of $500,000.00, and to secure them executed a mortgage or deed of trust on certain real and personal property located in Seattle, Washington, being an apartment building known as the "Marlborough House," together with the personal property situated therein, all of which it then owned. Default in the payment of these bonds occurred May 10, 1932, at which time the amount of outstanding bonds was $453,900.00.

Shortly after the default a bondholders' committee was organized, consisting of William D. Perkins, W. C. Bulette, and Harvey Lantz, and a written "Deposit Agreement" was executed by the above three persons constituting the committee, in which the National Bank of Commerce of Seattle was designated as depository.

Bonds were deposited under the deposit agreement to the extent of more than 97 percent of the whole. The holders of $441,000.00 of par value bonds came in under the deposit agreement, deposited their bonds thereunder, and authorized the bondholders' committee to act for them. The holders of $12,800.00 par value of bonds failed to deposit.

Under date of August 15, 1932, the bondholders' committee in writing requested the National Bank of Commerce of Seattle, the trustee under the trust deed and mortgage, to commence foreclosure proceedings because of the existing defaults in payments, and it did so on August 26, 1932. [36]

While the foreclosure proceedings were pending, a written stipulation was entered into between certain of the defendants in the action and the trustee bank, as plaintiff, under date of July 1, 1933, by which the parties consented to the entry of a decree of foreclosure, and by the further terms of which the record owners of the property, i. e., State Developers, Inc., a corporation, and Russell L. Cooley and Lillian A. Cooley, his wife, each executed and delivered a quitclaim deed to all the property in question in consideration of the payment of the sum of $10,025.00 cash. In these deeds the name of the grantee was left blank.

The stipulation specifically authorized the plaintiff and/or its attorneys to insert the name of the grantee in the deeds. On September 28, 1938, the attorneys for the plaintiff, acting under the written authority conferred in the stipulation, filled in the name of Russell C. Perkins, trustee for the bondholders' committee, as grantee in each of the deeds and on the same day Perkins, as trustee, executed and delivered a quitclaim deed covering all the property to Marlborough House, Inc., the taxpayer herein, which was organized by the bondholders on or about November 10, 1933, to take over and man-

age the property acquired by the bondholders at the foreclosure sale.

By the stipulation, the defendants further agreed to turn over to the plaintiff or its nominees, on July 1, 1933, the possession of the real and personal property involved. The bondholders' committee put up the money for the purchase of the property from the record owners and was made the nominee of the plaintiff, to whom the possession of the property was turned over. [37]

The committee appointed Russell C. Perkins its agent to collect the rents and pay the expenses of the general management of the building and to take physical possession of the building for the committee. Perkins, on the first day of July 1933, took physical possession of the property, and thereafter, until November 20, 1933, managed the property, collected the rents, and paid the expenses for the committee.

After the passing of title to this property from State Developers, Inc., and Russell L. Cooley and wife by the quitclaim deeds dated July 1, 1933, the foreclosure action was prosecuted to judgment and sale. The judgment and decree of foreclosure was entered in accordance with the stipulation and on the same date as the stipulation. The sheriff's foreclosure sale was held on the 30th day of September 1933, and the bondholders' committee was the successful bidder and purchaser. The sale was thereafter duly confirmed by the Superior Court having jurisdiction of the matter and thereafter the

sheriff's certificate of purchase covering the property was made out to the bondholders' committee and was duly assigned by the committee on the back page thereof to Marlborough House, Inc. After the year of redemption had gone by and the property had not been redeemed the sheriff's deed to the property was issued directly to Marlborough House, Inc., assignee of the bondholders' committee.

The bid price at the sheriff's sale submitted by the bondholders' committee was $340,425.00. The bid was accepted and the property was sold to the bondholders' committee. The purchase price was paid mainly by a surrender of the deposited bonds, the remainder by cash. The total amount [38] of the bonds deposited with the sheriff to apply upon the purchase price of the real and personal property was $441,100.00. The holders of the non-deposited bonds were paid in cash their proportion of the purchase price after deducting pro rata cost and expense of the foreclosure, which resulted in a payment to them of 73.58 percent of the face value of their bonds.

Marlborough House, Inc., after it was organized and took possession of the property, issued all of its stock to the bondholders of the Marlborough Investment Co. who had deposited their bonds with the committee.

Bondholders Committee did not file an income tax return for any period. Marlborough House, Inc., the taxpayer herein, at the time of filing its first return, included figures of gross income and deductions for

the period between July 1, and December 31, 1938, which period covers the period of existence of the bondholders' committee and the first period of existence within the year 1933 of the corporation.

In the audit of the return filed for 1933 by the aforementioned corporation, the Commissioner determined that the Bondholders Committee was an association taxable as a corporation for the period July 1, 1933 to November 20, 1933, under the provisions of Section 1111(a)(2) of the Revenue Act of 1932 (Articles 1312-14, Reg. 77), and that its income should be reported and included on a separate return; and that the first taxable year of the taxpayer herein was the period from November 21, 1933 to December 31, 1933.

The Board of Tax Appeals sustained the Commissioner in the above-entitled matters. [39]

In determining the amount of depreciation allowable for the respective taxable period November 21 to December 31, 1933 and the years 1934 and 1935, involved herein, the Commissioner computed depreciation on the property known as the Marlborough House, by using a cost basis of the said property to Bondholders Committee (less depreciation sustained by it for the period held by it), the Commissioner having taken the position that the Bondholders Committee was the predecessor owner or transferor of the said property, and that the cost to it was the price bid and paid at the foreclosure sale on September 30, 1933 for the physical depreciable assets.

The Board of Tax Appeals sustained the contention of the taxpayers that the above-described transactions constituted a "reorganization" within the meaning of Sections 112(a)(3) and 112(i) of the Revenue Act of 1932, and the Marlborough House, Inc., was organized and the property known as the "Marlborough House" was transferred thereto by the Marlborough Investment Co., pursuant to a plan of reorganization, and that the basis upon which depreciation is allowable in respect to the property bid in at the foreclosure sale is the basis for depreciation in the hands of the predecessor corporation, the Marlborough Investment Co., less the depreciation already taken by such corporation (based on a 30-year remaining life of the building from July 1, 1933, instead of a remaining life of 45 years, as determined by the Commissioner).

Based upon the Board's determination, the taxpayer herein is allowed additional depreciation in the amount of $1,844.16 for the period November 21, 1933 to December 31, 1933, and $16,598.09 for each of the years 1934 and 1935. [40]

The Commissioner presents that the Bondholders Committee did not acquire the property of the predecessor owner in connection with a statutory reorganization but at a foreclosure sale, and that the basis for computing depreciation of the property in the hands of the taxpayer, the Marlborough House, Inc., is the cost basis of the said property as of September 30, 1933 to the Bondholders Committee (less depreciation sustained by it) and that the cost is

represented by the price bid and paid at the foreclosure sale. (The Commissioner concedes that the remaining life of the building is 30 years from July 1, 1933.) The Commissioner also presents that the Bondholders' Committee was the predecessor owner or transferor of the property and that the basis allowable to the said Committee is the basis applicable to the taxpayer herein.

IV.

ASSIGNMENTS OF ERROR

That the Commissioner of Internal Revenue, being aggrieved by the opinion and decision of the United States Board of Tax Appeals in this proceeding hereby petitions for a review of said opinion and decision by the United States Circuit Court of Appeals for the Ninth Circuit, and for the correction of the manifest errors which therein occurred, and intervened to his prejudice. The errors committed by the Board, which are relied upon by the Commissioner as the basis of this petition for review, are as follows:

(1) The Board erred in holding and deciding that the acquisition by the Bondholders Committee of the property known as the "Marlborough House" as the result of a foreclosure sale, and the subsequent acquisition [41] of the same property by the taxpayer constituted a reorganization, as that term is defined in Sections 112(a)(3) and 112(i) of the Revenue Act of 1932.

(2) The Board erred in holding and deciding

that the acquisition by the Bondholders Committee of the property known as the "Marlborough House" and its subsequent transfer to the taxpayer were pursuant to a plan of reorganization.

(3) The Board erred in failing to hold and decide that there was not such a continuity of interest in the property of the Marlborough Investment Co., known as the "Marlborough House," in the hands of the Bondholders Committee or the taxpayer, as is contemplated by the provisions of Section 112(i)(1) of the Revenue Act of 1932.

(4) The Board erred in holding and deciding that the taxpayer's basis for computing depreciation on the property known as the "Marlborough House" is the cost or basis of the said property in the hands of the Marlborough House, Inc., (less depreciation already taken by such corporation.

(5) The Board erred in failing to hold and decide that the taxpayer's basis for computing depreciation on the property known as the "Marlborough House", acquired on or about November 1, 1933, from the Bondholders Committee, is its cost to the Bondholders Committee, which is the price bid and paid at the foreclosure sale on September 30, 1933 (less depreciation taken by the said Committee). [42]

(6) The Board erred in failing to hold and find that the Bondholders Committee was the predecessor owner or transferor of the property in the hands of the taxpayer.

(7) The Board erred in holding and finding that there is no deficiency in income tax due from the taxpayer for the period November 21 to December 31, 1933, and that there is an overpayment for the said period in the amount of $10.79.

(8) The Board erred in failing to hold and find that there is due from the taxpayer for the period November 21 to December 31, 1933 a deficiency in income tax in the amount of $245.33.

(9) The Board erred in holding and finding that there is no deficiency in income tax due from the taxpayer for the taxable year 1934, and that there is an overpayment in the amount of $1,090.68 for the said year 1934.

(10) The Board erred in failing to hold and find that there is a deficiency in income tax due from the taxpayer for the year 1934 in the amount of $441.76.

(11) The Board erred in holding and finding that there is no deficiency in income tax due from the taxpayer for the year 1935.

(12) The Board erred in failing to hold and find that there is a deficiency in income tax due from the taxpayer for the year 1935 in the amount of $1,120.35.

(13) The Board erred in that its opinion and decision are contrary to the law and the evidence. [43]

Wherefore, the Commissioner petitions that said findings of fact and opinion and decision of the United States Board of Tax Appeals be reviewed by the Circuit Court of Appeals for the Ninth Circuit; that a transcript of the record be prepared in

accordance with the law and the rules of said court and be transmitted to the Clerk of said court for filing and that appropriate action be taken to the end that the errors herein complained of may be reviewed and corrected by said court.

(Signed) SAMUEL O. CLARK, JR.
Assistant Attorney General.

(Signed) J. P. WENCHEL
RLW
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:
CLAUDE R. MARSHALL,
Special Attorney,
Bureau of Internal Revenue.
CRM/csl 4/26/40 [44]

United States of America
District of Columbia—ss.

Claude R. Marshall, being duly sworn, says that he is a Special Attorney in the Bureau of Internal Revenue, and as such is duly authorized to verify the foregoing petition for review; that he has read said petition and is familiar with the contents thereof; that said petition is true of his own knowledge except as to the matter therein alleged on information and belief, and as to these matters he believes it to be true.

(Signed) CLAUDE R. MARSHALL

Sworn and subscribed to before me this 1st day of May, 1940.

(Signed) GEORGE W. KREIS
Notary Public.

My commission expires November 15, 1942.

[Endorsed]: U.S.B.T.A. Filed May 13, 1940. [45]

In the United States Circuit Court of Appeals
for the Ninth Circuit

[Title of Cause.]

NOTICE OF FILING PETITION FOR REVIEW

To: Harold L. Scott, C. P. A.,
500 Insurance Building,
Seattle, Washington.

You are hereby notified that the Commissioner of Internal Revenue did, on the 13th day of May, 1940, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit, of the decisions of the Board heretofore rendered in the above-entitled cases. A copy of the petition for review and the as-

signments of error as filed is hereto attached and served upon you.

Dated this 13th day of May, 1940.

(Signed) J. P. WENCHEL
RLW
Chief Counsel,
Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 18 day of May, 1940.

HAROLD L. SCOTT
Attorney for Respondent on Review.

CRM/csl 5/1/40

[Endorsed]: U.S.B.T.A. Filed May 22, 1940. [46]

In the United States Circuit Court of Appeals
for the Ninth Circuit

[Title of Cause.]

NOTICE OF FILING PETITION FOR REVIEW

To: William Z. Kerr, Esq.,
309 Hoge Building,
Seattle, Washington.

You are hereby notified that the Commissioner of Internal Revenue did, on the 13th day of May, 1940, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Ap-

peals for the Ninth Circuit, of the decisions of the Board heretofore rendered in the above-entitled cases. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 13th day of May, 1940.

(Signed) J. P. WENCHEL
RLW
Chief Counsel,
Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 15 day of May, 1940.

W. Z. KERR
Attorney for Respondent on Review.

CRM/esl 5/1/40

[Endorsed]: U.S.B.T.A. Filed May 22, 1940. [47]

In the United States Circuit Court of Appeals
for the Ninth Circuit

[Title of Cause.]

NOTICE OF FILING PETITION FOR REVIEW

To: R. C. Perkins, Secretary,
Marlborough House, Inc.,
211 Cherry Street,
Seattle, Washington.

You are hereby notified that the Commissioner of

Internal Revenue did, on the 13th day of May, 1940, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit, of the decisions of the Board heretofore rendered in the above-entitled cases. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 13th day of May, 1940.

(Signed) J. P. WENCHEL
RLW
Chief Counsel,
Bureau of Internal Revenue.

Personal service of the above and foregoing notice together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 15 day of May, 1940.

R. O. PERKINS,
For Repsondent on Review.

CRM/csl
5/2/40

[Endorsed]: U.S.B.T.A. Filed May 22, 1940.

[48]

In the United States Circuit Court of Appeals
for the Ninth Circuit

[Title of Cause.]

STATEMENT OF POINTS

Comes Now the Petitioner on Review herein and makes this concise Statement of Points on which he intends to rely on the review herein, to-wit:

(1) The Board of Tax Appeals erred in holding and deciding that the acquisition by the Bondholders Committee of the property known as the "Marlborough House" as the result of a foreclosure sale, and the subsequent acquisition of the same property by the taxpayer constituted a reorganization, as that term is defined in Sections 112(a)(3) and 112(i) of the Revenue Act of 1932.

(2) The Board of Tax Appeals erred in holding and deciding that the acquisition by the Bondholders Committee of the property known as the "Marlborough House" and its subsequent transfer to the taxpayer were pursuant to a plan of reorganization.

(3) The Board of Tax Appeals erred in failing to hold and decide that there was not such a continuity of interest in the property of the Marlborough Investment Co., known as the "Marlborough House," in the hands of the Bondholders Committee or the taxpayer, as is contemplated by the provisions of Section 112(i)(1) of the Revenue Act of 1932. [49]

(4) The Board of Tax Appeals erred in holding

and deciding that the taxpayer's basis for computing depreciation on the property known as the "Marlborough House" is the cost or basis of the said property in the hands of the Marlborough Investment Co. (less depreciation already taken by such corporation).

(5) The Board of Tax Appeals erred in failing to hold and decide that the taxpayer's basis for computing depreciation on the property known as the "Marlborough House", acquired on or about November 1, 1933, from the Bondholders Committee, is its cost to the Bondholders Committee, which is the price bid and paid at the foreclosure sale on September 30, 1933 (less depreciation taken by the said Committee).

(6) The Board of Tax Appeals erred in failing to hold and find that the Bondholders Committee was the predecessor owner or transferor of the property in the hands of the taxpayer.

(7) The Board of Tax Appeals erred in holding and finding that there is no deficiency in income tax due from the taxpayer for the period November 21 to December 31, 1933, and that there is an overpayment for the said period in the amount of $10.79.

(8) The Board of Tax Appeals erred in failing to hold and find that there is due from the taxpayer for the period November 21 to December 31, 1933 a deficiency in income tax in the amount of $245.33.

(9) The Board of Tax Appeals erred in holding and finding that there is no deficiency in income tax

due from the taxpayer for the taxable year 1934, and that there is an overpayment in the amount of $1,090.68 for the said year 1934. [50]

(10) The Board of Tax Appeals erred in failing to hold and find that there is a deficiency in income tax due from the taxpayer for the year 1934 in the amount of $441.76.

(11) The Board of Tax Appeals erred in holding and finding that there is no deficiency in income tax due from the taxpayer for the year 1935.

(12) The Board of Tax Appeals erred in failing to hold and find that there is a deficiency in income tax due from the taxpayer for the year 1935 in the amount of $1120.35.

(13) The Board of Tax Appeals erred in that its opinion and decision are contrary to the law and the evidence.

J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

Service of a copy of the within Statement of Points to be relied on is hereby admitted this 1 day of July 1940.

W. Z. KERR,
Attorney for Respondent on Review.

CRM/csl
6/10/40 [51]

[Endorsed]: U.S.B.T.A. Filed Aug. 7 1940.

In the United States Circuit Court of Appeals for the Ninth Circuit

[Title of Cause.]

DESIGNATION OF PORTIONS OF RECORD, PROCEEDINGS AND EVIDENCE TO BE CONTAINED IN RECORD ON REVIEW.

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause, in connection with the joint petition for review by the said Circuit Court of Appeals for the Ninth Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries (both Dockets).
2. Pleadings before the Board (both Dockets):
   (a) Petition, including annexed copy of notice of deficiency and statement attached.
   (b) Amended Petition (omitting copy of notice of deficiency and statement attached).
   (c) Answer to amended petition.
3. Decision (both Dockets).
4. Petition for review (having BTA-Docket Nos. 90452 and 90487), together with proof of service of notice of filing petition for review and of service of a copy of petition for review.
5. Statement of points (having BTA-Docket Nos. 90452 and 90487) to be relied on, together with

proof of service of notice of filing Statement of Points and of service of a copy of Statement of Points. [52]

6. Designation of Portions of Record, etc., (having BTA-Docket Nos. 90452 and 90487).

The following documents to be included by reference only (see Record in Commissioner v. Bondholders Committee, et al., BTA-Docket No. 90486):

(a) Findings of Fact and Opinion of Board.

(b) Consolidated Statement of Evidence and exhibits attached.

(c) Orders of Court enlarging time.

(d) Order of Court consolidating proceedings, etc.

Said transcripts to be prepared, certified and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

J. P. WENCHEL,
W.
Chief Counsel,
Bureau of Internal Revenue.

Service of a copy of the within Designation of Portions of Record, etc., is hereby admitted this 1 day of July, 1940.

No objection.

W. Z. KERR,
Attorney for Respondent on Review.

CRM/csl 6/4/40

[Endorsed]: U.S.B.T.A. Filed Aug. 7, 1940. [53]

[Title of Board and Cause.]

CERTIFICATE

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 53, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 12th day of August, 1940.

[Seal] B. D. GAMBLE,
Clerk, United States Board of Tax Appeals.

[Endorsed]: No. 9602. United States Circuit Court of Appeals for the Ninth Circuit. Commissioner of Internal Revenue, Petitioner, vs. Bondholders Committee, Marlborough Investment Co., First Mortgage Bonds, a corporation, Respondent. Transcript of the Record. Upon Petition to Review a Decision of the United States Board of Tax Appeals.

Filed, August 16, 1940.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

B. T. A.

Docket Nos. 90452 & 90487.
USCCA No. 9602-03

GUY T. HELVERING, Commissioner of Internal Revenue,

Petitioner on Review,

v.

MARLBOROUGH HOUSE, INC.,

Respondent on Review.

B. T. A.

Docket No. 90486.

GUY T. HELVERING, Commissioner of Internal Revenue,

Petitioner on Review,

v.

BONDHOLDERS COMMITTEE,
MARLBOROUGH INVESTMENT CO.,
FIRST MORTGAGE BONDS,

Respondent on Review.

DESIGNATION OF PORTIONS OF THE RECORD TO BE PRINTED INCLUDING STATEMENT OF POINTS.

Comes Now the petitioner on review above-named, by his counsel, Samuel O. Clark, Jr., Assistant At-

torney General, and complying with the rules of this Court, pertaining to the designation of the portions of the record to be printed, states that he relies upon the entire consolidated record certified by the Clerk of the United States Board of Tax Appeals to this Court pursuant to its order entered herein, and directs that the said consolidated record so certified including Statement of Points to be relied upon in the respective causes previously filed with the Board and transmitted as a part of the certified consolidated record, which Statements of Points are adopted herein, be printed as the records on review, except however, that the following portions of the "Petitioners' Exhibits," photostatic copies of which are attached to the consolidated Statement of Evidence, and made a part thereof, be not printed or photostated in the consolidated record on review:

(Petitioners') No. of Exhibit	Description of Exhibit	Page to Omit
3	Warranty Deed	First and Last Pages, marked C-1, and C-4.
4	Trust Deed or Mortgage	Page 14 to end—marked D-15 to D-28, both inclusive.
5	Warranty Deed and Bill Sale	First page marked E-1 and Inventory on pages marked E-3 to E-9, both inclusive.
6	Notice of Change of Name	Last page marked F-3.
7	Warranty Deed	First and last pages, marked G1 and G-4.
8	Statutory Warranty Deed	First and last pages, marked H-i and H-4.
9	Deed	First and last pages, marked J-1 and J-4.
12	Decree	Pages 4 to 12, and last page, marked L-4 to L-12, inclusive, and L-17.
13	Order of Sale	Page 3 to Part II on page 11, and last page, marked M-3 to M-11, and M-14.
18	Statutory Quit-claim Deed	Folder page, marked R-2
19	Certificate of Purchase	Last page, marked S-4.
20	Sheriff's Deed	First and last pages, marked T-1 and T-5.

SAMUEL O. CLARK, JR.,
Assistant Attorney General,
Attorney for Petitioner on Review.

Service of a copy of the within Designation of Portions of the Record to be printed and Statement of Points to be relied upon is hereby admitted this ..... day of ....., 1940, and consented to.

.....
Attorney for Respondents on Review.

[Endorsed]: Filed Aug. 24, 1940. Paul P. O'Brien, Clerk.

Nos. 9602, 9603

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

No. 9602

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

BONDHOLDERS COMMITTEE,
MARLBOROUGH INVESTMENT CO.,
FIRST MORTGAGE BONDS, a corporation,
Respondent.

No. 9603

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

MARLBOROUGH HOUSE, INC., a corporation,
Respondent.

Upon Petitions to Review Decisions of the United States Board of Tax Appeals

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PARKER PRINTING COMPANY, 543 SANSOME STREET, SAN FRANCISCO.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Wednesday, January 29, 1941.

Before: Wilbur, Mathews and Healy,
Circuit Judges.

[Title of Cause.]

ORDER OF SUBMISSION

Ordered petitions to review herein argued by Mr. Maurice J. Mahoney, Special Assistant to the Attorney General, counsel for petitioner, and Mr. Wm. Z. Kerr, counsel for respondents, and submitted to the court for consideration and decision.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Saturday, March 8, 1941.

Before: Wilbur, Mathews and Healy,
Circuit Judges.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND CONCURRING OPINION, AND FILING AND RECORDING OF JUDGMENTS

By direction of the Court, ordered that the typewritten opinion and concurring opinion this day

rendered by this court in above causes be forthwith filed by the clerk, and that a judgment be filed in each cause and recorded in the minutes of this court in accordance with the opinions rendered.

[Title of Circuit Court of Appeals and Causes.]

Upon Petitions to Review Decisions of the United States Board of Tax Appeals

OPINION

Before: Wilbur, Mathews and Healy, Circuit Judges.

Wilbur, Circuit Judge:

These two petitions to review decisions of the Board of Tax Appeals were consolidated for hearing and involve income taxes for the years 1933, 1934 and 1935. The facts are not in dispute.

The Marlborough Investment Company, a corporation, issued its bonds aggregating $500,000, secured by a trust deed on an apartment building known as Marlborough House and personal property therein. Defaults occurred in the payment of principal and interest; the principal sum of $453,000 was unpaid. Shortly thereafter holders of these bonds amounting to $441,000 deposited their holdings with a committee under an agreement which gave it broad powers for working out and executing a plan for protecting their interests. Acting under this authority the committee caused the

trustee to begin foreclosure proceedings upon the trust deed, formed a new corporation known as Marlborough House, Inc., to take over the property, gathered in an outstanding third party interest to clear the title, purchased the property at the foreclosure sale through a trustee or agent, and finally caused it to be conveyed by the purchaser to the new corporation in exchange for all of its stock.

The purchase price at the foreclosure sale was $340,425. This was paid partly in cash in the amount of $10,025, but mainly by the bonds deposited with the committee. Although the face value of these bonds was $441,000 their market value and the cash paid did not together exceed the purchase price.

Under a stipulation made during the pendency of the foreclosure proceedings possession was taken by an agent on behalf of the respondent Bondholders' Committee on July 1, 1933, although the foreclosure sale did not occur until September 30, 1933. The agent managed Marlborough House on the Committee's account from the time of taking possession until November 20, 1933. The Committee made no return upon the income earned during this period; but, the Commissioner, holding that the Bondholders' Committee while operating the property was an association taxable as a corporation upon income derived from such operation, made a deficiency assessment against it in the amount of $1498.02 and added a penalty of 25%, amounting to $374.51, the

whole assessment being $1872.53. The Committee appealed from his determination to the Board of Tax Appeals. The Board decided that there had been an over-assessment and that the deficiency amounted to but $136.45, with a corresponding 25% penalty of $34.11, a total of $170.56. From this decision appeal No. 9603 has been taken by the Commissioner.

Appeal No. 9603 concerns the income tax of the respondent Marlborough House, Inc., for the taxable period November 21, 1933 to December 31, 1933, and for the year 1934 and 1935 upon income derived from the operation of Marlborough House by the corporation after the transfer to it by the Bondholders' Committee. The petitioner assessed a deficiency against respondent of $245.33 for 1933, of $441.76 for 1934, and of $1120 for 1935. Upon appeal by the respondent the Board of Tax Appeals decided that there had been an overpayment of $10.79 for the year 1933, of $1070.68 for 1934 and no deficiency for 1935. From this decision the Commissioner appealed.

The parties are agreed that their conflicting contentions as to the amount of income tax properly chargeable to each respondent on account of its operation of Marlborough House arise from their adoption of different bases for calculating the depreciation of the operating property. The petitioner held that the transactions whereby the Bondholders' Committee first acquired the property and then transferred it to Marlborough House, Inc., did not

amount to a tax-free reorganization within any of the exceptions recognized in §112 of the Revenue Act of 1932. He further held that therefore the true basis for calculating depreciation was, according to §§113, 114, of the Act, the amount bid at the time of acquisition of the property by the Bondholders' Committee at the foreclosure sale on September 20, 1933. The Board, on the other hand, held that there was such a tax-free reorganization under §112 of the said Act and, accordingly, that the true basis for calculating depreciation was, under §§113, 114, the original cost to Marlborough Investment Company.

One of the errors assigned by the petitioner is that the Board erred in finding that the various steps taken by the Bondholders' Committee were in pursuance of a plan of reorganization. It may be assumed that if all that happened was a series of unrelated and unplanned happenings there would have been no such corporate reorganization as that recognized by §112, Revenue Act of 1932, which seems clearly to contemplate action taken in pursuance of some definite plan. But this point has not been pressed and, as pointed out by the Board of Tax Appeals, what was done followed so closely a common practice in similar cases that the existence of a plan may well have been inferred by the Board.

In holding that there was such a reorganization the Board of Tax Appeals relied mainly upon Commissioner v. Kitselman, 89 F.2d 458 (C.C.A. 7),

(cert. denied, 302 U. S. 709) and, Commissioner v. Newberry Lumber & Chemical Co., 94 F.2d 447 (C.C.A. 6).

In the Kitselman and Newberry cases, as in the case at bar, the bondholders of an insolvent corporation, upon the surrender and exchange of their bonds, became the stockholders of a new corporation, to which, in accordance with a previously adopted plan, the assets of the old corporation purchased by the bondholders had been transferred by them. In the Kitselman case the court recognized that to effect a reorganization within the terms of §112 of the Revenue Act of 1928, as construed by the Supreme Court in G. K. Mfg. Co. v. Helvering, 296 U. S. 389, there must be a "continuity of interest of the transferor or its stockholders in the transferee", but, the court, notwithstanding the elimination of the stockholders of the transferor corporation, saw the requisite continuity in that corporation's bondholders. The court said, in part:

"Although the instant situation is rather novel in the aspect that neither the stockholders nor corporation participated in the plan whereby the mortgage was foreclosed, the new company formed and assets transferred to the committee and by it to the new company, we believe a statutory reorganization was effected. The only reason the stockholders did not participate in the plan was that their stock represented no assets and was valueless, and therefore they were without right to speak. In re, 630 Church Street Corporation, 299 U. S. 24.

"Bondholders are ordinarily viewed merely as auditors, but where the assets of the corporation are less than its obligations, the bondholders are in actuality and for all practical purposes pretty much the corporation."

It will be noted that the passage quoted assumes a controlling analogy between a reorganization under §77-b of the Bankruptcy Act, which was before the court in In re 630 Church Street Corporation, supra, and a reorganization within the exception recognized by §§112, 113, of the Revenue Act of 1932. But the validity of that assumption is open to serious doubt. The purpose of the reorganization contemplated in the Bankruptcy Act is the preservation of the bankrupt's property both for him and his creditors. When, as in the Church Street Corporation case, supra, the stockholders' equitable interest has disappeared owing to the insolvency of the corporation, reorganization may still be advantageous to the creditors and therefore within the policy of the Bankruptcy Act. On the other hand, the obvious purpose of §112 of the Revenue Act of 1932 is to impose a tax upon a gain, or allow a deduction for a loss, upon the sale or exchange of property. But, to enable corporations or their stockholders to change the form or manner of conducting their business without being held to have transferred the business itself they are permitted under §112, to make a tax-free reorganization. When, however, the corporation loses its property and the interest of the stockholders has been wiped out, as in the

case at bar, the reorganization cannot effect the purpose of the exception.

The petitioner contends that these cases relied upon by the respondents have been in effect overruled by Le Tulle v. Scofield, Collector, 308 U. S. 415. The facts in that case were in substance as follows: Le Tulle owned all the stock of a solvent irrigation company. A tri-party contract was made between him, the irrigation company and a solvent water company, whereby he undertook to obtain certain properties and convey them to the irrigation company and the latter agreed to convey thereafter all of its assets to the water company, for which the latter was to pay, and accordingly did pay, $50,000 in cash and $750,000 in its bonds. Subsequently, all of the assets of the irrigation company, consisting then of cash and bonds, were turned over to Le Tulle as a dividend, after which he caused the dissolution of the irrigation company. The irrigation company reported no gain on account of the cash and bonds received by it from the water company and Le Tulle reported no gain on account of the dividend received by him from the irrigation company. The Commissioner assessed to Le Tulle additional income taxes on account of both transactions. Le Tulle contended that this was a tax-free reorganization within the purview of §112, Revenue Act of 1932; the Commissioner contended that there was merely a sale by the irrigation company to the water company for bonds and cash, followed by a dividend to Le Tulle. The Su-

preme Court affirmed the judgment of the Fifth Circuit Court of Appeals, which had agreed with the Commissioner, and held that there had not been a tax-free reorganization. The requisite continuity of interest was lacking.

There is an obvious factual difference between the Le Tulle case and those relied upon by respondents. (Commissioner v. Kitselman, supra; Commissioner v. Newberry L. & C. Co., supra.). In the former the sole stockholder of one corporation, whose assets he causes to be transferred to another corporation, becomes the bondholding creditor of that other. In each of the other cases bondholders of one corporation, whose assets they caused to be transferred to another corporation, emerge as the stockholder of the other corporation. But there is an equally obvious similarity. In each case all of the assets of one corporation are transferred to another. In each case the transferor corporation, along with its stockholders, loses all of its interest in the property transferred. But respondent contends that there is a further factual and decisive difference between the Le Tulle case, on the one hand, and the Kitselman and Newberry cases, on the other. It is pointed out that in the Le Tulle case there was no insolvent corporation; whereas in those cases, as in the instant case, the bondholders succeeded to the proprietary interest of the stockholders, so that, when the transfer occurred, their interest, though undergoing a change in form, was in substance continuous, thus satisfying the statute.

In deciding the Le Tulle case the Supreme Court was not unaware of either the Kitselman or Newberry case. While mentioning both without express approval or disapproval, the opinion used language broad enough to overrule both cases on principle, as clearly appears from the following excerpt:

"When the consideration is wholly the transferee's bonds, or part cash and part such bonds, we think it cannot be said that the transferor retains any pecuniary interest in the enterprise. On the contrary, he becomes a creditor of the transferee; and we do not think that the fact referred to by the Circuit Court of Appeals, that the bonds were secured solely by the assets transferred and that, upon default, the bondholders would retake only the property sold, changes his status from that of a creditor to one having a proprietary stake, within the purview of the statute."

That this principle should be regarded as generally applicable in all cases in which the continuity of interest requisite for a reorganization within the terms of §112, Revenue Act of 1932, is in question, seems fairly inferable from the decision in Helvering v. Tyng, 308 U. S. 527. The facts in that case, so far as here material, were substantially as follows: Barstow and Co., a corporation, owned a controlling interest in the stock of General Gas & Electric Corporation; but a controlling interest in the stock of Barstow & Co., was in turn owned by Barstow Securities Corporation, a majority of whose voting stock was owned by Tyng and associates. In pursu-

ance of a plan whereby Associated Gas & Electric Co., another corporation, sought to obtain, and did obtain, a controlling interest in the stock of General Gas & Electric. Tyng and associates sold their stock in Securities to Associated, receiving therefor cash, bonds and debentures. The Commissioner held that the transaction was not a reorganization within the meaning of §112 (i) (1), 26 U.S.C.A. §112, included the value of the obligations of Associated received by taxpayer Tyng and associates in their gross income for 1929, and determined certain tax deficiencies upon that basis. The Board of Tax Appeals held that the transaction was such a reorganization and reduced the deficiencies accordingly. The Circuit Court of Appeals of the Second Circuit held that the Board was right in holding that the transaction was a reorganization rather than a sale. In reaching its decision the court relied in part upon the Kitselman and Newberry cases, supra, upon which respondents chiefly rely in the cases at bar, endeavoring to distinguish them from the Le Tulle case. The Supreme Court granted certiorari and reversed the judgment upon the authority of Le Tulle v. Scofield, supra, thus holding that there was no continuity of interest.

Reversed.

Mathews, Circuit Judge (concurring in the result):

These are consolidated petitions to review decisions of the Board of Tax Appeals.[1] In No. 9602,

1. 40 B. T. A. 881.

the Commissioner of Internal Revenue seeks reversal of a decision which redetermined the income tax liability of a bondholders' committee[2] for 1933. In No. 9603, the Commissioner seeks reversal of decisions[3] which redetermined the income tax liability of Marlborough House, Inc., a corporation, for 1933, 1934 and 1935.

The Commissioner determined, and the Board agreed, that the committee, in computing its net income for 1933, was entitled to an allowance for depreciation of certain property—an apartment house in Seattle, Washington—which the committee acquired and transferred to Marlborough House, Inc., in 1933, and that Marlborough House, Inc., was entitled to an allowance for depreciation of the same property in computing its net income for each of the years 1933, 1934 and 1935. As to the basis on which such depreciation should be determined, the Commissioner and the Board did not agree. Hence, the question here is, What was the proper basis?

Section 23 of the Revenue Act of 1932 provides that, in computing net income, certain deductions shall be allowed. One is specified in §23(k): "A rea-

2. The committee calls itself "Bondholders Committee, Marlborough Investment Co., First Mortgage Bonds." Originally it consisted of Harvey Lantz, William D. Perkins and W. O. Bulette. Lantz died and was succeeded by T. H. Lovell. Subsequently Perkins died. The name of his successor, if any, is not disclosed.

3. One relating to 1933, one relating to 1934 and 1935.

sonable allowance for [depreciation][4] of property used in the trade or business." Section 23(m) provides that the basis on which depreciation is to be allowed shall be "as provided in section 114." Section 114 provides that the basis on which depreciation is to be allowed in respect of any property shall be "the adjusted basis provided in section 113(b) for the purpose of determining the gain or loss upon the sale or other disposition of such property." Section 113(b) provides that the adjusted basis for determining such gain or loss shall be "the basis determined under subsection (a)," with specified adjustments. Subsection (a) provides that, with specified exceptions, the basis of property shall be "the cost of such property."

Thus, in each of the cases at bar, unless the case came within one of the exceptions specified in §113(a), the basis of the property was the cost thereof to the taxpayer—the committee in No. 9602, Marlborough House, Inc., in No. 9603—with adjustments as provided in §113(b).

The Board found—and its findings are not challenged—that the property here involved was purchased by the committee on September 30, 1933, at a sheriff's sale under a judgment foreclosing a mortgage securing bonds issued by Marlborough

4. In the statute, this is spoken of as an allowance for exhaustion, wear and tear, and obsolescence. See §§23(k), 23(m) and 114(a).

Investment Company,[5] a corporation, 97% of which were held by the committee; that the bonds so held were surrendered by the committee and accepted by the sheriff in part payment of the purchase price of the property; that the balance of the purchase price was paid in money; that Marlborough House, Inc., was organized on November 10, 1933; and that, thereafter, in 1933, the property was transferred by

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5. The bonds were issued and the mortgage was executed on May 20, 1927. The mortgagor (Marlborough Investment Company) owned the property at that time, but, on December 31, 1928, transferred it to The F. S. Stimson Company (also known as Stimson-Moore Company), from which, by mesne conveyances, the title passed to State Developers, Inc., which, on May 13, 1932, transferred a one-half interest therein to Russell L. Cooley. State Developers, Inc., and Cooley were the record owners of the property at the time of the foreclosure sale, but were not the actual owners; for theretofore, on July 1, 1938, they had executed and delivered to the mortgagee (The National Bank of Commerce of Seattle, Trustee) quitclaim deeds to the property for a consideration of $10,025 paid to them by the committee. At that time, no grantee's name appeared in either of the quitclaim deeds. It was agreed, however, that the name of a grantee might be inserted by the mortgagee or its attorneys. Accordingly, on September 28, 1938—long after the foreclosure sale—the name of R. C. Perkins, trustee for the committee, was inserted in each deed. The committee took possession of the property on July 1, 1933, and retained such possession until November 10, 1933, or shortly thereafter, when it transferred the property to Marlborough House, Inc.

the committee to Marlborough House, Inc., in exchange for the latter's stock.

The Commissioner held that the committee's case (No. 9602) did not come within any of the exceptions specified in §113(a); that, therefore, the basis of the property in the hands of the committee was the cost thereof to the committee, with adjustments as provided in §113(b); that the case of Marlborough House, Inc. (No. 9603) came within the exception specified in §113(a)(8);[6] and that, therefore, the basis of the property in the hands of Marlborough House, Inc., was the same as it was in the hands of the committee, with adjusfments as provided in §113(b).

The Board did not, in terms, hold that either of the cases came within any exception specified in §113(a). It did, however, hold in each case that the basis of the property in the hands of the taxpayer—

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6. Section 113(a)(8) provides: "If the property was acquired after December 31, 1920, by a corporation * * * by the issuance of its stock or securities in connection with a transaction described in section 112(b)(5) * * * then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon such transfer under the law applicable to the year in which the transfer was made." Section 112(b)(5) provides: "No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation, and immediately after the exchange such person or persons are in control of the corporation * * *".

the committee in No. 9602, Marlborough House, Inc., in No. 9603—was the same as it was in the hands of Marlborough Investment Company, less the depreciation already taken by the Investment Company; and, in support of its holding, cited §113(a)(6).[7] I assume, therefore, that the Board intended to, and did in effect, hold that each case came within the exception specified in §113(a)(6).

Section 113(a)(6) applies only to property acquired upon an exchange described in §112(b) to (e), inclusive. The Board did not, in terms, hold that the property here involved was acquired by either of the taxpayers upon an exchange described in §112(b) to (e), inclusive. It did, however, in support of its holding, cite §112(b)(3).[8] I assume, therefore, that the Board intended to, and did in effect, hold that the property was acquired by each

---

7. Section 113(a)(6) provides: "If the property was acquired upon an exchange described in section 112(b) to (e), inclusive, the basis shall be the same as in the case of the property exchanged, decreased in the amount of any money received by the taxpayer and increased in the amount of gain or decreased in the amount of loss to the taxpayer that was recognized upon such exchange under the law applicable to the year in which the exchange was made * * *"

8. Section 112(b)(3) provides: "No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization."

of the taxpayers upon an exchange described in §112(b)(3).

Section 112(b)(3) describes in exchange of stock or securities for stock or securities—an exchange whereby "stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock of securities in such corporation or in another corporation a party to the reorganization." It does not describe any other exchange. The Board did not find, and upon the evidence could not have found, that the property here involved was acquired by either of the taxpayers upon an exchange of stock or securities for stock or securities. Instead, the Board found, as upon the evidence it was compelled to find, that the property was acquired by the committee upon an exchange of bonds and money for the property and by Marlborough House, Inc., upon an exchange of stock for the property—property which was neither stock nor securities, but an apartment house. No such exchange is described in §112(b)(3).

Although, as stated, the Board did not find that either of the exchanges here involved was an exchange of stock or securities for stock or securities, it did find that both exchanges were made in pursuance of a plan of "reorganization," as defined in §112(i). Thereupon the Board concluded that each of the exchanges must necessarily be an

exchange described in §112(b)(3).[9] In this the Board erred. For it is not true that every exchange made in pursuance of a plan of reorganization is an exchange described in §112(b)(3). It is, of course, true that an exchange not made in pursuance of a plan of reorganization is not an exchange described in §112(b)(3). It is equally true, however, that an exchange which is not an exchange of stock or securities for stock or securities is not an exchange described in §112(b)(3). Since, as I have shown, neither of the exchanges here involved was an exchange of stock or securities for stock or securities, it is, for present purposes, immaterial whether they were or were not made in pursuance of a plan of reorganization. I accordingly leave that question undecided.

If it were true, as it is not, that the exchanges here involved were exchanges described in §112(b)(3), these cases would then be within the exception specified in §113(a)(6); but it still would not follow that the basis of the property in the hands of the taxpayers or either of them would be the same as it was in the hands of Marlborough In-

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9. The Board's opinion states: "Holding as we do that there was here a reorganization within the meaning of sections 112(b)(3) and 112(i), Act of 1932, it follows that the basis for depreciation in the hands of [the taxpayers] will be the same as that in the hands of the predecessor corporation, the Marlborough Investment Co., less the depreciation already taken by such predecessor. Sec. 113(a)(6), Act of 1932."

vestment Company, less the depreciation already taken by the Investment Company. Section 113 (a)(6) lays down no such rule. It provides that the basis of property acquired upon any exchange therein mentioned shall be the same as in the case of the "property exchanged,"[10] increased or decreased as specified.[11] In the committee's case, the "property exchanged" was bonds; in the case of Marlborough House, Inc., it was stock. The Board disregarded the basis thus prescribed and adopted a basis which, upon its own theory, was wrong.

The Board did not hold, nor do the taxpayers contend, that either of the exchanges here involved was an exchange described in §112(b)(1), 112 (b)(2), 112(b)(4), 112(b)(5), 112(c), 112(d) or 112(e). The implied holding[12] that they were exchanges described in §112(b)(3) was, as I have shown, inconsistent with the findings and contrary to the evidence. There was, therefore, no basis for holding that these cases or either of them came within the exception specified in §113(a)(6). The

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10. Meaning, of course, the property which was exchanged for the property whose basis is to be determined. The "property exchanged" may be stock, bonds or other property.

11. See footnote 7.

12. Implied from the fact that the Board cited §112(b)(3) in support of its holding that the basis of the property in the hands of each taxpayer was the same as it was in the hands of Marlborough Investment Company, less the depreciation already taken by the Investment Company.

Board did not hold, nor do the taxpayers contend, that either of the cases came within any of the other exceptions specified in §113(a). In each of the cases, therefore, the Commissioner's determination as to the basis of the property should have been, and is by me, accepted as correct.

Commissioner v. Kitselman, 7 Cir., 89 F. 2d 458, and Commissioner v. Newberry Lumber & Chemical Co., 6 Cir., 94 F. 2d 447, cited by the Board, are readily distinguishable from the cases at bar. No question of depreciation was involved in either of the cited cases. In the Kitselman case, the question was whether the taxpayer was entitled to deduct a loss said to have been sustained upon an exchange whereby the taxpayer exchanged bonds of one corporation for stock and bonds of another corporation. The court held that the bonds of each corporation were securities; that the exchange was made in pursuance of a plan of reorganization to which both corporations were parties; and that, therefore; the loss was not deductible—citing §112 (b)(3). The court did not hold or intimate that an exchange of stock or securities for property other than stock or securities would be an exchange described in §112(b)(3).

In the Newberry case, the question was whether the taxpayer (a corporation) should have included as part of its taxable income gains said to have resulted from an exchange whereby real property was transferred to the taxpayer by a bondholders' committee solely in exchange for stock and bonds

of the taxpayer, and immediately after the exchange the committee was in control of the taxpayer. The court held that the bonds were securities, and that the gains were not taxable, citing §112(b)(5). The court also held that the exchange was made in pursuance of a plan of reorganization, and cited §112(b)(3) and 112(b)(4). The last mentioned holding and citations were superfluous. For if the bonds were securities, the exchange there involved—whether made in pursuance of a plan of reorganization or not—was an exchange described in §112(b)(5), and the gains were, for that reason, not taxable. If the bonds were not securities, the exchange was not an exchange described in §112(b)(3), 112(b)(4) or 112(b)(5), and the whole case was wrongly decided. I do not construe the decision as holding that an exchange of stock or securities for property other than stock or securities is an exchange described in §112(b)(3). If it does so hold, it is clearly wrong and should not be followed.

Whether or to what extent, if at all, the Kitselman and Newberry cases have been overruled by LeTulle v. Scofield, 308 U. S. 415, and Helvering v. Tyng, 308 U. S. 527, we have no occasion to decide.

The decisions should be reversed.

[Endorsed]: Opinion and Concurring Opinion. Filed Mar. 8, 1941. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 9602

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

BONDHOLDERS COMMITTEE, et al.,
Respondents.

JUDGMENT

Upon Petition to Review a Decision of the United States Board of Tax Appeals.

This Cause came on to be heard on the Transcript of the Record from the United States Board of Tax Appeals and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Decision of the said Board of Tax Appeals in this Cause be, and hereby is reversed.

[Endorsed]: Filed and entered March 8, 1941. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 9603

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

MARLBOROUGH HOUSE, INC.,
Respondent.

JUDGMENT

Upon Petition to Review a Decision of the United States Board of Tax Appeals.

This Cause came on to be heard on the Transcript of the Record from the United States Board of Tax Appeals and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Decisions of the said Board of Tax Appeals in this Cause be, and hereby are reversed.

[Endorsed]: Filed and entered March 8, 1941. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Thursday, April 17, 1941.

Before: Wilbur, Mathews and Healy,
Circuit Judges.

[Title of Cause.]

ORDER DENYING PETITION
FOR A REHEARING

Upon consideration thereof, and by direction of the court, it is ordered that the petition of respondents, filed April 5, 1941, and within time allowed therefor by rule of court, for a rehearing of each of above causes be, and hereby is denied.

[Title of Circuit Court of Appeals and Causes.]

ORDER STAYING ISSUANCE OF MANDATE

Upon application of William Z. Kerr, counsel for the respondents, and good cause therefor appearing, it is ordered that the issuance, under Rule 28, of the mandates of this Court in the above cause be, and hereby is stayed to and including May 31, 1941; and in the event the petition for a writ of certiorari to be made by the respondents herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the man-

dates of this Court are to be stayed until after the said Supreme Court passes upon the said petition.

CURTIS D. WILBUR
United States Circuit Judge

Dated: San Francisco, California, May 5, 1941.

[Endorsed]: Filed May 5, 1941. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

CERTIFICATE OF CLERK, U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing two hundred eighty-five (285) pages, numbered from and including 1 to and including 285, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the respondents, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 8th day of May, 1941.

[Seal] PAUL P. O'BRIEN,
Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 9602

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

vs.

BONDHOLDERS COMMITTEE, ETC., Respondent

No. 9603

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

vs.

MARLBOROUGH HOUSE, INC., Respondent

ORDER STAYING ISSUANCE OF MANDATE

Upon application of William Z. Kerr, Esq. counsel for the respondents, and good cause therefor appearing, It Is Ordered that the issuance, under Rule 28, of the mandate of this Court in the above cause be, and hereby is stayed to and including June 7, 1941; and in the event the petition for a writ of certiorari to be made by the respondents herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

Curtis D. Wilbur, United States Circuit Judge.

Dated: San Francisco, California, May 29, 1941.

(Endorsed:) Filed May 29, 1941.

Paul P. O'Brien, Clerk. (Seal United States Circuit Court of Appeals, Ninth Circuit.)

Attest: A True Copy.
May 29, 1941.

Paul P. O'Brien, Clerk.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1941

No. 128

ORDER ALLOWING CERTIORARI—Filed October 13, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1941

No. 129

ORDER ALLOWING CERTIORARI—Filed October 13, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office Supreme Court, U.S.
JUN 5
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 128

No. 129

BONDHOLDERS COMMITTEE, MARLBOROUGH INVESTMENT COMPANY, FIRST MORTGAGE BONDS, *Petitioner,*

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

MARLBOROUGH HOUSE, INC., a corporation, *Petitioner,*

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

AND BRIEF IN SUPPORT THEREOF

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FRAYN PRINTING COMPANY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. .....

No. .....

BONDHOLDERS COMMITTEE, MARLBOROUGH INVESTMENT COMPANY, FIRST MORTGAGE BONDS, *Petitioner,*

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PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

AND BRIEF IN SUPPORT THEREOF

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FRAYN PRINTING COMPANY

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No.....

No.....

BONDHOLDERS COMMITTEE, MARLBOROUGH INVESTMENT COMPANY, FIRST MORTGAGE BONDS, *Petitioner*,

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

MARLBOROUGH HOUSE, INC., a corporation, *Petitioner*,

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

PETITION FOR WRITS OF CERTIORARI

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The joint petition of BONDHOLDERS COMMITTEE, MARLBOROUGH INVESTMENT COMPANY, FIRST MORTGAGE BONDS, AND MARLBOROUGH HOUSE, INC., a corporation, respectfully sets forth the following:

SUMMARY STATEMENT OF MATTER INVOLVED

These causes involve deficiency income tax liabilities. The Commissioner determined a deficiency against the petitioner, the Bondholders Committee, Marlborough Investment Company, First Mortgage Bonds, in the sum of $1,498.02 representing tax on income received by the Committee during the period prior to the organization of the Marlborough House, Inc., from July 1 to November 20, 1933, inclusive, plus a penalty of 25% for failure of the committee to file a return on such income on the theory that the Committee's powers were so broad as to render it a corporation under Article 1314, Regulation 77, Revenue Act of 1932 (R. 13).

The Commissioner also determined a deficiency against Marlborough House, Inc., for the period from November 20, 1933, to December 31, 1933, of $245.33 and for the years 1934 of $441.76 and 1935 of $1,120.35 (R. 234-235).

The taxpayers secured a reversal of the ruling of the Commissioner in the Board of Tax Appeals (In re *Marlborough House, Inc.*, 40 B.T.A. 822, R. 23-43). The Commissioner petitioned the Circuit Court of Appeals for the Ninth Circuit for review and the causes were consolidated for hearing in the Circuit Court (R. 64). The Circuit Court decided the cause in favor of the Commissioner on March

8, 1941 (R. 261). A petition for rehearing was denied on April 17, 1941 (R. 284).

All of the deficiencies are the outgrowth of the Commissioner's determination that the basis for depreciation is the price paid for mortgaged property by the Bondholders Committee at a foreclosure sale of a first mortgage bond issue by the Marlborough Investment Company, an insolvent corporate mortgagor (R. 8, 14, 15, 209, 211, 212).

The taxpayers both claimed a greater basis of valuation for calculating depreciation, namely, costs of the insolvent mortgagor, the Marlborough Investment Company, a corporation, 97% of whose first mortgage bonds the Bondholders Committee held at the time it acquired possession and title to the property (R. 214), because the steps and proceedings by which the taxpayers acquired title to the property bring the taxpayers within the reorganization provisions of the applicable revenue acts, and, if so, the depreciation allowances claimed by the taxpayers are sufficient deductions from gross income to avoid deficiency liability. The taxpayer also claims that even if there was no reorganization within the contemplation of the statutes, the depreciation allowance to the taxpayers should be based on the sum of $466,968, the par value and cost of bonds held by the Committee and paid in as a part of the purchase price in the foreclosure sale, plus other cash advances by bondholders to secure

possession and title, and not the price bid at the foreclosure sale, $340,425.

On May 20, 1927, the Marlborough Investment Company, a corporation, issued its bonds in the sum of $500,000.00, secured by a mortgage deed of trust on an apartment building and furniture, known as the Marlborough House. The mortgagor defaulted in the payment of the bonds on May 10, 1932, at which time the amount of outstanding bonds was $453,900.00 (R. 26).

Shortly after default, a Bondholders Committee was organized and a written deposit agreement was executed, giving the Committee broad powers, including the power to acquire the property at foreclosure sale, or otherwise, and the power to organize a new corporation and convey the property to such corporation in exchange for such corporation stock, and to distribute the stock so received to depositing bondholders (R. 26, 27).

Holders of $441,100.00 of par value bonds, approximately 97% of the amount outstanding, deposited under the agreement. Holders of but $12,800.00 par value bonds failed to deposit. Pursuant to instructions from the Bondholders Committee, the trustee of the mortgage deed of trust instituted foreclosure proceedings (R. 31).

While the foreclosure was pending, at the request

of the Bondholders Committee, the plaintiff trustee, on July 1, 1933, entered into a written stipulation with certain defendants who were in possession of the mortgaged property, holding title by mesne convenances from the mortgagor, by the terms of which these defendants agreed to execute and deliver quit claim deeds for all of the mortgaged property in consideration of $10,025.00 cash, paid by the Committee (R. 31). These deeds were delivered on that day. The deeds left the grantee's name blank, but the stipulation specifically authorized the plaintiff, or its attorneys to insert the name of the grantee in the deed, which was done in 1938 (R. 32, 79-81).

Part of the stipulation of July 1, 1933, required possession of the mortgaged property to be immediately yielded to the plaintiff or its nominee. The Bondholders Committee appointed Russell C. Perkins as its agent with authority to collect rents, pay expenses of management, and take possession of the property. Perkins, on July 1, 1933, went into physical possession of the property, and performed these duties from July 1 to November 20, 1933. As a part of this transaction, on July 1, 1933, through its attorney, the Marlborough Investment Company, the insolvent mortgagor, approved the form of the foreclosure decree which was entered on the same day (R. 33, 154).

A foreclosure sale was held September 30, 1933.

The Bondholders Committee bid in the property at the foreclosure sale for $340,425 (R. 33). The price was paid by a deposit with the sheriff of $441,100 par value in bonds, $6425.64 cash, to cover the costs and expenses of the proceedings, and $9418.24 cash, to pay non-depositing bondholders their pro rata portion of the purchase price (R. 164).

The Committee determined the amount of its bid at the sale to some extent by the amount of the cash available for payment to non-depositing bondholders, and to some extent by its desire to assure depositing bondholders of an adequate and fair return on the investment in the event of a redemption of the property (R. 34, 72). The sale was confirmed October 16, 1933 (R. 164).

The Bondholders Committee, on November 10, 1933, organized the Marlborough House, Inc., a corporation, and on November 20, 1933, transferred possession of the mortgaged property, and assigned the sheriff's certificate of purchase to the new corporation in exchange for all of its capital stock (R. 11, 12). This capital stock was distributed pro rata to the depositing bondholders. The common stockholders of the Marlborough Investment Company, because of the insolvency, received nothing.

Because of the severe financial depression subsequent to July 1, 1933, the Bondholders Committee made no attempt to sell the property, nor was there a market for its sale between July 1 and November

20, 1933. Neither the fair market value of the bonds deposited with the Committee, plus the cash required to purchase the property, nor the fair market value of the property was in excess of $340,425 at the date of the foreclosure sale, or on July 1, 1933 (R. 34).

The taxpayers assert that there was a reorganization within the intent of the applicable sections of the Revenue Act of 1932, although the stockholders of the insolvent mortgagor corporation are given no participation in the new corporation. When encumbered assets of the corporation are substantially less than its bonded debt, the bondholders are, for all practical purposes, the corporation. When under such circumstances bondholders become the moving spirit in a reorganization of the properties and act as owners-in-fact of the old corporation's assets in carrying out their plan, even through the medium of a foreclosure sale, there is accomplished a reorganization of a practical and common sense type within the intent of Section 112 (a) (3) and Section 112 (i) (l) (a) of the Act of 1932. The depreciation basis for the Committee and new corporation should be the same as in the hands of the predecessor, the insolvent corporation, less depreciation already taken by such predecessor, Section 113 (a), Section 113 (a) (6) and (a) (7), Section 114 Act of 1932.

The Commissioner and the taxpayers are in

agreement that the basis for depreciation of the property in the hands of the Marlborough House, Inc., is the same as in the hands of the committee, Section 113 (a) (8) and Section 112 (b) (5) with adjustments as provided in Section 113 (b).

JURISDICTION

1. The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code as amended by Act of February 13, 1935, 43 Stat. 938, 28 U. S. C. A. Section 347 (a).

2. The date of the judgment of the Circuit Court of Appeals of the Ninth Circuit herein sought to be reviewed is March 8, 1941, and petition for rehearing was denied April 17, 1941.

QUESTIONS PRESENTED

1. Did not the Circuit Court of Appeals of the Ninth Circuit err in refusing to hold that the steps taken by the Bondholders Committee, Marlborough Investment Company, and Marlborough House, Inc., constituted a reorganization whereby the Committee and the Marlborough House, Inc., as parties to the reorganization were entitled to the same basis for depreciation as the predecessor insolvent mortgagor corporation, the Marlborough Investment Company?

2. Did not the Circuit Court of Appeals of the Ninth Circuit err in refusing to hold that this case was controlled by rules laid down in *Commissioner vs. Newberry L. & C. Co.*, 94 Fed. (2d) 447 (C. C. A.

6th) and *Commissioner vs. Kitselman,* 89 Fed. (2d) 458 (C. C. A. 7th)?

3. Did not the Circuit Court of Appeals for the Ninth Circuit err in interpreting the holdings of *LeTulle vs. Scofield,* 308 U. S. 415, and *Helvering vs. Tyng,* 308 U. S. 527, as overruling the cases of *Commissioner vs. Kitselman* supra and *Commissioner vs. Newberry L. & C. Co.* supra?

4. Did not the Circuit Court of Appeals of the Ninth Circuit err in holding that there was a lack of continuity of interest between the Marlborough Investment Company, the Committee, and the Marlborough House, Inc., because the stockholders of the predecessor Marlborough Investment Company did not participate in the stock of Marlborough House, Inc.?

5. Did not the Circuit Court of Appeals of the Ninth Circuit err in failing to hold that Section 113 (a). (7) was applicable to the facts found by the Board of Tax Appeals, even if Section 113 (a) (6) cited in the Board's opinion was inapplicable?

6. Did not the Circuit Court of Appeals of the Ninth Circuit err, after holding there was a break in the continuity of proprietory interest, in refusing to consider the cash advanced by the Committee plus the par value and cost of the bonds, a total of $466,968, as the basis of the cost of property under Section 113 (a) of the 1932 Act, rather than the amount bid at the foreclosure sale, $340,425?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRITS

1. The decision of the Circuit Court of Appeals for the Ninth Circuit is in conflict with the decision of *Newberry L. & C. Company,* 94 Fed. (2d) 447 (C. C. A. 6th) and *Commissioner vs. Kitselman,* 89 Fed. (2d) 458 (C. C. A. 7th). Since the decision by the Circuit Court of Appeals of the Ninth Circuit, two decisions have been rendered by the Circuit Court of Appeals of the Fifth Circuit on substantially the same matters, contrary to the decision of the Ninth Circuit, in the cases of *Commissioner vs. Southwestern Consolidated Corporation,* decided April 19, 1941, and *Commissioner vs. Alabama Asphaltic Limestone Company, Inc.,* decided May 5, 1941.

2. The decision of the Circuit Court of Appeals for the Ninth Circuit involves an important question of federal law which, though difficult of application, has been interpreted in a long series of Board of Tax Appeal decisions at variance with the holding of the Ninth Circuit. Prior to *LeTulle vs. Scofield,* 308 U. S. 415, January 2, 1940, the Board in a series of cases involving both the question of the proper basis for depreciation and depletion and the right to deduct losses by bondholders who on insolvency foreclosures received stock for bonds. All of these Board cases had followed the reasoning and decisions of the Kitselman and the Newberry cases.

In re *Leckie*, 37 BTA 252
Howard Hotel Corp., 39 BTA 1147
Sunstein, BTA Memo Docket, No. 82529 (CCH 9954-E, February, 1938)
Altshuler, BTA Memo Docket, No. 84568 (CCH 10432-C, August 27, 1938)
Post Office Building Co., BTA Memo Docket No. 93083 (CCH 10795-B, July 28, 1939)
Southwest Consolidated Corp., BTA Memo Docket No. 93321 (CCH 10808-I, August 25, 1939)
York Furniture Company, BTA Memo Docket No. 92778 (CCH 10825-B, September 18, 1939)

Immediately following the LeTulle decision on February 14, 1940, the Board decided the case of *Alabama Asphaltic Limestone Co., Inc.*, 41 BTA 324. The influence of the LeTulle decision is evidenced in both the majority and dissenting opinions in this Board decision. Thereafter the Board has decided the following cases in accordance with its prior holdings and continues to distinguish the LeTulle decision.

New Haven and Shore Line Railway Company, BTA Memo Docket No. 98309 (CCH 11014-A, February 9, 1940). The basis for depreciation of the prior insolvent corporation was accepted as the basis for the bondholders' new corporation. This case was argued before the Circuit Court of Appeals for the Second Circuit on April 7, 1941. The decision has not been filed at this writing.

New President Corp., BTA Memo Docket No. 96367 (CCH 11111-B, May 18, 1940) and *James Q.*

Newton Trust, 42 BTA 73, August 6, 1940.

On March 12, 1941, the Board also decided *Agnes Neustadt*, 43 BTA Docket No. 99935, and distinguished the LeTulle case from the Kitselman case on the ground that in the LeTulle case there was in reality a sale "lurking in the disguise of reorganizations."

Palm Springs Holding Corp., BTA Memo Docket No. 95262 (CCH 11045, March 23, 1940). This involves the basis of the bondholders' company for depreciation. However a decision for the Commission was filed May 14, 1941. Docket No. 9661 ..... Fed. (2d) ....., reversing the Board.

3. That the decisions of the Ninth Circuit has largely resulted from a misconstruction of the decision of this court in *LeTulle vs. Scofield*, 308 U. S. 415.

4. That it is important that this court should clarify the application, if any, of its decision in the LeTulle case to reorganizations of defaulted bond issues, because courts (other than the Ninth Circuit) and the Board of Tax Appeals since the rendition of the LeTulle decision, have uniformly held the LeTulle decision consistant with reorganizations of defaulted bond issues. In this respect the decision of the Ninth Circuit is in conflict with the Fifth, Sixth and Seventh Circuit Courts of Appeal and the Board in its application of the LeTulle decision. Analyses of the LeTulle decision as applied

to various Board of Tax Appeal cases and the statute have been reviewed by various students who disagree with the conclusions of the Commissioner and the Ninth Circuit. (See C. C. H. *Illustrative Bulletin E*, May 8, 1940, *The Meaning of LeTulle vs. Scofield.* Sil[illegible]erson, 18 Tax Magazine, 492 (1940), *Income Tax Problems of Reorganization,* Virgil S. Chandler, December, 1940, University of Kansas City Law Review, Volume IX, page 22).

5. That the decision of the Circuit Court of the Ninth Circuit is such a departure, as above stated, from the accepted and usual course of decisions in covering the subject matter as to justify this court in exercising its powers.

WHEREFORE, the petitioners respectfully pray that writs of certiorari be issued out of and under the seal of this honorable court directed to the Circuit Court of the Ninth Circuit commanding that court to certify and send to this court on the date designated in said writ full and complete transcript of record of all proceedings in the cases entitled on its docket *Commissioner of Internal Revenue vs. Bondholders Committee, Marlborough Investment Company, First Mortgage Bonds, No.* 9602 and *Commissioner of Internal Revenue vs. Marlborough House, Inc., No.* 9603, to the end that the said cases may be reviewed and determined by this court as provided by law and that your petitioner may have

such other and further relief in the premises as to this honorable court may seem proper.

Dated at Seattle, Washington, May 31, 1941.

BONDHOLDERS COMMITTEE, MARLBOROUGH INVESTMENT COMPANY, FIRST MORTGAGE BONDS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No.

No.

BONDHOLDERS COMMITTEE, MARLBOROUGH INVESTMENT COMPANY, FIRST MORTGAGE BONDS, *Petitioner*,

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

MARLBOROUGH HOUSE, INC., a corporation, *Petitioner*,

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI

OPINIONS OF THE COURT BELOW

The petition of the taxpayers prevailed before the Board of Tax Appeals. The opinion of the Board of Tax Appeals is entitled In re *Marlborough House, Inc. vs. Commissioner of Internal Revenue*, and *Bondholders Committee, Marlborough Investment Company, First Mortgage Bonds, vs. Commissioner*, 40 BTA 822 (R. 23-43).

The Commissioner prevailed before the Circuit Court of Appeals for the Ninth Circuit. The opinion is reported as *Commissioner of Internal Revenue vs. Bondholders Committee* and *Commissioner of Internal Revenue vs. Marlborough House, Inc.*, 118 Fed. (2d) 511 (R. 261-281).

JURISDICTION

1. The jurisdiction, or jurisdictions, of this court is invoked under Section 240 (a) of the Judicial Code as amended by Act of February 13, 1935, 43 Stat. 938, 28 U. S. C. A. Section 347 (a).

2. The date of the judgment of the Circuit Court of Appeals of the Ninth Circuit herein sought to be reviewed is March 8, 1941, and petition for rehearing was denied April 17, 1941.

3. The cases believed by your petitioner to sustain your jurisdiction and relied on for the exercise thereof are referred to in the proceeding petition, pages 11-14, to which reference is made for the sake of brevity.

STATEMENT OF THE CASE

For the sake of brevity, we refer to the proceeding petition, page 1 to 8.

ASSIGNMENTS OF ERROR

1. The Circuit Court of Appeals for the Ninth Circuit erred in refusing to hold that the steps taken by the Bondholders Committee, the Marlborough Investment Company, and Marlborough House, Inc., constituted a reorganization whereby

the Committee and the Marlborough House, Inc., as parties to the reorganization were entitled to the same basis for depreciation as the predecessor insolvent mortgagor corporation, the Marlborough Investment Company.

2. The Circuit Court of Appeals for the Ninth Circuit erred in refusing to hold that this case was controlled by rules laid down in *Commissioner vs. Newberry L. & C. Co.*, 94 Fed. (2d) 447 (C. C. A. 6th), and *Commissioner vs. Kitselman*, 98 Fed. (2d) 458 (C. C. A. 7th).

3. The Circuit Court of Appeals for the Ninth Circuit erred in interpreting the holdings of the *LeTulle vs. Scofield*, 308 U. S. 415, and *Helvering vs. Tyng*, 308 U. S. 527, as overruling the cases of *Commissioner vs. Kitselman*, supra, and *Commissioner vs. Newberry L. & C. Co.*, supra.

4. The Circuit Court of Appeals erred in holding that there was a lack of continuity of proprietary interest between the Marlborough Investment Company, the Committee, and the Marlborough House, Inc., because the stockholders of the predecessor, the Marlborough Investment Company, did not participate in the stock of the Marlborough House, Inc.

5. The Circuit Court of Appeals erred in failing to hold that Section 113 (a) (7) was applicable to the facts found by the Board, even if Section 113 (a) (6) cited in the Board's opinon was inapplicable.

6. The Circuit Court of Appeals erred, after holding there was a break in the continuinty of proprietary interest, in refusing to consider the cash advanced by the Committee plus the par value and cost of bonds, a total of $466,968, as the basis of the cost of the property under Section 113 (a) of the 1932 Revenue Act, rather than the amount bid at the foreclosure sale, $340,425.

ARGUMENT

1. The Circuit Court of Appeals for the Ninth Circuit erred in refusing to hold that the steps taken by the Bondholders Committee, the Marlborough Investment Company, and Marlborough House, Inc., constituted a reorganization whereby the Committee and the Marlborough House, Inc., as parties to the reorganization were entitled to the same basis for depreciation as the predecessor insolvent mortgagor corporation, the Marlborough Investment Company.

Each taxpayer is entitled to an allowance against gross income for the exhaustion, wear, and tear of property used in the trade or business, including reasonable allowance for obsolescence. This depreciation allowance is provided in Section 23 (k), Act of 1932. (26 U. S. C. A. Rev. Act 1932, p. 491). (See Appendix for statutes).

The basis upon which the depreciation is allowed, Section 23 (m), Act of 1932, (Id. p. 491) is by Section 114 of the Act (Id. p. 519) the same adjusted basis as provided in Section 113 (b) (Id. p. 518)

"for the purpose of determining the gain or loss upon the sale or other disposition of such property."

The adjusted basis for determining gain or loss under subsection (a) of 113 is "the cost of such property" but there are thirteen exceptions to cost as the basis (Section 113 (a) (1) to (13) (Id. p. 514 to 518). Three of these exceptions are pertinent to the present case; Section 113 (a) (6) (Id. p. 515), tax-free exchanges generally; Section 113 (a) (7) (Id. p. 516), transfers to a corporation where control of property remains in the same persons; and Section 113 (a) (8) (Id. p. 516), property acquired by issuance of stock or as paid-in surplus.

By Section 113 (a) (8) (Id. p. 516), the basis of the assets to the Marlborough House, Inc., is cost in the hands of the Bondholders Committee, because this transaction is a transfer to a corporation controlled by the transferor. Section 112 (b) (5) (Id. p. 511). The taxpayer and Commissioner were agreed on this point in the court below.

Under Section 113 (a) (6) (Id. p. 515), the sixth exception, "If property is acquired upon an exchange in Section 112 (b) to (e) (Id. p. 511 to 513) inclusive, the basis is the same as in the case of property exchanged, decreased in the amount of any money received by the taxpayer and increased in the amount of gain or decrease in the amount of loss to the taxpayer that was recognized upon such exchange under the law applicable to the year in

which the exchange was made." Under this exception the basis of the depositing bondholders for their stock in the new corporation, the Marlborough House, Inc., would be the same as the basis they had for their deposited bonds in exchange for which they received that stock, provided the exchange for stock is a transaction described in Section 112 (b) to (e) (Id. p. 511 to 513).

Section 112 (b) (3) (Id. p. 511) excepts exchanges of stocks for stock on reorganization using the following language:

> "No gain or loss shall be recognized if stock or securities in a corporation, a party to a reorganization, are in pursuance of the plan of reorganization exchanged solely for stock or securities in such corporation, or in another corporation, a party to the reorganization."

Here the bondholders exchanged their bonds (securities) of the Marlborough Investment Company, an insolvent corporation, for stock in the Marlborough House, Inc., (another corporation). The Board determined as a fact, (1), that there was a reorganization, (2), that the corporations were parties to the reorganization, and (3), that there was a plan of reorganization.

Section 113 (a) (7) (Id. p. 516) fixes the adjusted basis for determining gain or loss in cases of "Transfers to corporation where control of property remains in the same persons." The section provides:

"If property was acquired after December 31, 1917, by a corporation in connection with a reorganization, and immediately after the transfer an interest or control in such property of 50% or more remained in the same persons or any of them, then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon such transfer under the law applicable to the year in which the transfer was made. This paragraph shall not apply if the property acquired consists of stock or securities in a corporation a party to the reorganization, unless acquired by the issuance of stock or securities of the transferee as the consideration in whole or in part for the transfer."

In the present case, the property was acquired after December 31, 1917, by the Marlborough House, Inc., a corporation, in connection with the reorganization of the Marlborough Investment Company. Immediately after the transfer, the interest and control of the property in excess of 50%, to-wit, 97%, remained in the same persons (bondholders) as controlled the old corporation, Marlborough Investment Company, because the Marlborough Investment Company stockholders' equity had completely disappeared upon its insolvency. This paragraph applies because the property acquired by the Marlborough House was wholly in consideration of the issuance of stock of the Marlborough House, Inc., to the bondholders of the old Marlborough Investment Company.

It is notable that both in Section 113 (a) (6) and Section 113 (a) (7) we must find a reorganization.

Congress has defined reorganization in Section 112 (i). (1) (Id. p. 513), which. so far as applicable, reads as follows:

> "As used in this section and Sections 113 and 115—
>
> (1) The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least the majority of the total numbers of shares of all other classes of stock of another corporation or substantially all the properties of another corporation) * * *
>
> (2) The term 'party to a reorganization' includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation."

The taxpayer contends that the property of the Marlborough Investment Company was acquired in connection with a merger or consolidation described in subdivision (A); namely, the acquisition by one corporation, the Marlborough House, Inc., of substantially all of the properties of the old corporation, the Marlborough Investment Company.

Since the Marlborough Investment Company was confessedly insolvent, its stock was valueless, its assets were a trust fund for the benefit of its creditors, the bondholders.

Graham vs. LaCrosse Ry., 102 U. S. 148, at p. 161;
Mellen vs. Moline Iron Works, 131 U. S. 352;
Hollins vs. Brierfield Coal Co., 150 U. S. 371 p. 385;

Blake vs. McClung, 172 U. S. 239;
Northern Pac. Ry. vs. Boyd, 228 U. S. 482;
Thompson vs. Huron Lumber Co., 4 Wash. 600, at p. 603;
Spinning vs. Allen, 10 Wash. 673.

Its bondholders were entitled to have all of its earnings devoted to the payment of its operating expenses and applied upon the interest and principal payments of the bonded debt. Its operating revenue was the source of nourishment for the bonds, and when the source became insufficient to feed the stockholders, the old company, in accordance with the wish of the Bondholders Committee, approved the foreclosure decree on July 1, 1933, and cooperated with the Committee and the record owners of the property in putting in motion a plan for vesting the title and possession of the properties in the Bondholders Committee, all of which, within a reasonable time, transformed the project, so far as the bondholders were concerned, into a new corporation of which the bondholders were now stockholders in exactly the same proportion as they controlled the properties on July 1, 1933. The business of the old corporation through this transition was continued by the new corporation by the equitable owners, the bondholders. In substance what happened was a reorganization of the Marlborough Apartment House properties under circumstances which the Commissioner always heretofore con-

tended was a reorganization, not entitling the bondholders to claim a loss.

The acquisition of assets through the medium of foreclosure proceedings does not of itself take a transaction out of the reorganization provision of the revenue statutes.

DeBlois vs. Commissioner, 36 Fed. (2d) 11 (C. C. A. 1st)
C. H. Mead Coal Co. vs. Commissioner, 72 Fed. (2d) 22 (C. C. A. 4th).
Securities Co. vs. Commissioner, 64 Fed. (2d) 330 (C. C. A. 2nd).
Shoenberg vs. Commissioner 77 Fed. (2d) 446 (C. C. A. 8th).
United States vs. Galveston-Houston Electric Co., 84 Fed. (2d) 516 (C. C. A. 1st) Certiorari denied, 299 U. S. 590.

The formation of a new corporation for the purpose of taking of assets of another corporation in financial difficulty is one of the common types of reorganization recognized by all reorganization statutes, and the component steps of what may be regarded as a single or general plan looking to the reorganization of a corporation will not be treated separately.

Kansas City Ry. Co. vs. Guardian Trust Company, 240 U. S. 166, at pp. 176-177;
Edwards vs. Chile Copper Co., 270 U. S. 452, at p. 455;
Howard vs. Commissioner, 56 Fed. (2nd) 781 (C. C. A. 6th);
Prairie Oil & Gas Co. vs. Motter, 66 Fed. (2nd) 309 (C.C. A. 10th);
West Texas Refining & D. Co. vs. Commissioner, 68 Fed. (2nd) 77 (C. C. A. 10th);
Ahles Realty Corp. vs. Commissioner, 71 Fed.

(2nd) 150 (C. C. A. 2nd), certiorari denied, 293 U. S. 611;

First Seattle D. H. Nat. Bank vs. Commissioner, 77 Fed. (2nd) 45 (C. C. A. 9th);

Starr vs. Commissioner, 82 Fed. (2nd) 964 (C. C. A. 4th).

Sage vs. Commissioner, 83 Fed. (2nd) 221 (C. C. A. 2nd);

Miller vs. Commissioner, 103 Fed. (2nd) 58;

Portland Oil Co. vs. Commissioner, 109 Fed. (2nd) 479;

Diescher vs. Commissioner, 110 Fed. (2nd) 90;

Snowden vs. McCabe, 111 Fed. (2nd) 743;

Morgan vs. Helvering, 117 Fed. (2nd) 334, at p. 336;

Fletcher Cyc. Corp., Vol. 15, Sec. 7226;

19 *Corpus Juris Secundum, Corporations*, Secs. 1578, 1585.

In 1924, after the 1924 Revenue Act embodied Section 203 and Section 204 in substantially the form, as Sections 112 and 113, of the 1932 Act, general counsel for the Internal Revenue Department issued *Bulletin IT* 2071 (C. B. III-2, p. 34) for guidance of the Department and taxpayers on this subject. The bulletin denies taxpayers the right to take losses on bonds in such reorganizations. In part it says:

> "The most common form of reorganization, especially in the case of defaulting corporations, is a reorganization in connection with an execution or foreclosure sale. It is often advisable for the bondholders of such a corporation to formulate some scheme of reorganization and in order to consummate the reorganization they may enter into an agreement for this purpose, appoint a committee or other agent to

represent them, to purchase the property at a foreclosure sale for their benefit, to form a new corporation and to transfer the property to it in return for stock or bonds or both. In the case of foreclosure, the reorganization takes place by procuring a sale under the mortgage, purchasing the property at the sale, and causing the same to be transferred to another corporation organized for that purpose by the bondholders. When the reorganization is through a foreclosure sale, stockholders need not be joined in the plan nor given the right to participate, and if they are given the right to participate it is purely a matter of favor."

Following this memorandum, the Commissioner consistently refused to allow losses to bondholders where they acquired the mortgaged property through foreclosure proceedings and became stockholders of the identical property instead of bondholders.

When the matter came before the Board in *Commissioner vs. Kitselman*, 33 BTA 498, the Board held that there was not a reorganization as defined in Section 112 (i) of the 1928 Act. The Commissioner secured a reversal of this holding before the Circuit Court of Appeals of the Seventh Circuit, *Commissioner vs. Kitselman*, 89 Fed. (2nd) 458. In securing this reversal, the Commissioner in the Kitselman case presented many of the foregoing authorities and the argument we here use is almost identical with the argument used by the Commissioner to this point in the Kitselman case.

The Circuit Court of Appeals of the Seventh Circuit accepted the government's position as sound and said in part:

> "Although the instant situation is rather novel in the aspect that neither the stockholders nor corporation participated in any way in the plan whereby the mortgage was foreclosed, the new company formed, and the assets transferred to the committee and by it to the new company, we believe a statutory reorganization was effected. The only reason the stockholders did not participate in the plan was that their stock represented no assets and was valueless, and therefore they were without right to speak. In re 620 Church Street Corporation, 299 U. S. 24, 27.
>
> "Bondholders are ordinarily viewed merely as creditors, but when the assets of the corporation are less than its obligations, the bondholders are in actuality and for all practical purposes pretty much the corporation. All that remains for the stockholders is the corporate charter—the corpse of the defunct corporation. When the new corporation was formed by the bondholders' representatives, it received all the corporate assets in exchange for the new company's stocks and bonds. The old stockholders as such received nothing.
>
> "There may not have been a reorganization in the sense that the capital structure was changed (except as to the bonds), but the essense of the corporate life—all its assets—were transferred by its bondholders to a new corporation in exchange for that corporation's stocks and bonds. It is not indispensable to a reorganization that there be a dissolution of the old corporation.
>
> "The novelty of this situation arises from the lack of participation by stockholders of the tranferor corporation. If they participated,

there would be little doubt as to the existence of a reorganization.

"It is clear that the bondholders were the moving spirit and were treated as the owners in fact, and it follows that they must be viewed as a class of 'stockholders' somewhat akin to preferred stockholders with cumulative dividend rights. Their position was stepped up by reason of what had occurred and the finding that there was no equity over the lien of the mortgage. Where the assets of the corporation fall far below the amount required to pay the bondholders in full, the bondholders in bankruptcy reorganization supersede the stockholders. They acquire the stockholders' rights to manage the corporate affairs. There is a difference between the position of stockholders in a case like the present one and stockholders of a corporation in bankruptcy proceeding under section 77B (11 U. S. C. A. §207) to a reorganization, but the analogies are sufficient to justify a study of the decisions in the latter field.

"We conclude that there was a reorganization within the contemplation of the statute and that therefore there was no loss realized upon the exchange of the bonds for the stock and bonds of the new company."

Kitselman petitioned for a writ of certiorari to this court which was denied, 302 U. S. 709. The Commissioner's brief reiterated the position the Commissioner had successfully urged before the Circuit Court. For instance, at page 11 of the government's brief in certiorari, we find the following statement:

"We submit that where the corporation's liabilities greatly exceeded its assets, so that only bondholders participated in the reorganization, it is sufficient that the bondholders received a substantial interest in the new corporation in

the form of common stocks and bonds. The only reason the stockholders did not participate in the plan was that their stock represented no assets and was valueless, and therefore they were without right to speak. See in re 620 Church St. Corp., 299 U. S. 24, 27. While bondholders are ordinarily viewed merely as creditors, when the assets of the corporation in receivership are less than its obligations the bondholders are for all practical pruposes the corporation. All that remains for the stockholders is the corporate charter. Here it is clear that the bondholders were the moving spirit in the reorganization and acted throughout as the owners in fact of the corporation's assets. The decision of the court below gives practical and common sense recognition to a well defined type of business reorganization."

In the meantime, while the law was developing to the Kitselman case, the Board had taken the position that the basis for depreciation of property in the hands of foreclosing bondholders and corporations organized by them for the purpose of acquiring the property foreclosed was either the fair market value of the property at the time it was sold on foreclosure or the fair market value of bonds used by the bondholders in payment of the price bid at the foreclosure sale. *Suncrest Lumber Company*, 25 BTA 375, *Newberry Lumber & Chemical Co.*, 33 BTA 150. The taxpayer in the Newberry case sought a review by the Circuit Court of Appeals of the Sixth Circuit.

In the Newberry case the corporation organized by the bondholders, and to which they transferred

the property after a foreclosure sale, had placed on its books for the major portion of the property a value which represented the cost at which they were carried on the books of the predecessor corporation less depreciation. The court in part said:

> "In the case at bar neither the petitioner nor its stockholders received any profit from the reorganization. The predecessor corporation transferred all of its assets to the petitioner, and immediately after, the transferor, through its bondholders, was in control of the assets transferred. It makes no difference that the transaction was effected by the bondholders' committee, for that committee acted for and represented the bondholders in the old corporation, who became bondholders and stockholders in the reorganized corporation. Nor is it important that the committee represented no stockholders in the original corporation, since it did represent the bonds, which are securities as indicated in the Minnesota Tea Company and Watt Cases, supra. In our opinion there was a reorganization with in the meaning of the statute. Where there is a reorganization there is no taxable gain in the transaction. In such case, too, the statute provides that the capital base for the reorganized corporation is the cost of the assets to the old corporation. Section 113 (a) (7) and section 114 (a) and (b) (1), of the Revenue Act of 1928, 26 U. S. A. **113, 114 notes. It was accordingly error for the Board to establish the capital base on cost price paid at the decretal sale. All the assets, including the inventories and accounts receivable, were owned by the old corporation and were transferred to the new. It is not our province on this review to determine what their

cost to the old corporation was in order to establish a base value for gain or loss on the inventory or for depletion and depreciation on the assets for the seven months here in question and for the future. Those are matters for administrative determination and must be made by the Board of Tax Appeals. To permit them to be made, the order of the Board is set aside and the cause remanded to it for a new hearing."

We believe it can be safely asserted that after the Kitselman and the Newberry decisions the problem was considered answered so long as congress did not substantially change the applicable sections of the Revenue Acts, and the Board of Tax Appeals thereafter decided their cases on the basis of these decisions.

When congress was considering the Revenue Act of 1934, there were suggestions that the exchange and reorganization portions of the statute should be repealed or drastically altered. The report of the Ways and Means Committee, found in C. B. 1939-1, part 2, pp. 564-565, is very illuminating. At page 564 the Committee reported:

"* * * Furthermore, the retention of the other reorganization provisions will prevent large losses from being established by bondholders and stockholders who receive securities in a newly reorganized enterprise which are substantially the same as their original investments * * * Likewise, many corporations have defaulted upon the dividends on their cumulative preferred stock, or upon the interest on their bonds. These corporations, in order to obtain necessary credit from the banks, are ar-

> ranging with their preferred stockholders to accept new common stock and with their bondholders to accept noncumulative preferred stock in place of preferred stock or bonds now held. If the reorganization provisions were omitted from the bill, these stockholders and bondholders could take large losses, although they still retain an interest in the corporation. Although the losses in the cases given would be subject to the new limitations the committee has placed upon the deduction of capital losses, the net result, during the next year or more, of omitting the reorganization provisions might be a loss of taxes to the Treasury."

The report of the Senate Finance Committee (CCB 1939-1, part 2, pp. 598, 599) came to the same conclusion, and the Acting Secretary of the Treasury (Report of subcommittee of Ways and Means Committee, 73rd Congress, 2nd Sess., p. 9) said:

> "In the second place, reorganizations today are generally being carried out in order to revise the capital structures of unsuccessful or insolvent enterprises. The immediate result of abolishing the reorganization provisions would be to permit the thousands of bondholders and stockholders of such organizations to establish losses, even though they obtain and retain securities in a new enterprise which is substantially the same as their original investment. Even though it be required that such losses can only be deducted from capital gains, a wide door will be opened to reduction of tax liability."

There has been no substantial change in these provisions of the statute by any succeeding congress and we, therefore, submit that every intendant should be indulged by the court to sustain the

practice that has grown up and been encouraged by the Treasury Department.

Other provisions of the Internal Revenue Acts permit bonds to be replaced by stock in such cases without stamp tax on the transfer. (See Schedule A-9 of Title VIII of the Revenue Act of 1926, as amended by section 724 of the Revenue Act of 1932.)

The first substantial encouragement to the Commissioner in his change of position came with the decision of *LeTulle vs. Schofield*, 308 U. S. 415, and its companion case *Helvering vs. Tyng*, 308 U. S. 527.

2. The Circuit Court of Appeals of the Ninth Circuit erred in refusing to hold that this case was controlled by rules laid down in *Commissioner vs. Newberry L. & C. Co.*, 94 Fed. (2d) 447, and *Commissioner vs. Kitselman*, 98 Fed. (2d) 458.

Judges Wilbur and Healy, while recognizing that the Kitselman and Newberry cases were factually distinguishable from the LeTulle case, plainly held that these cases were overruled by the following excerpt from the LeTulle decision:

> "When the consideration is wholly the transferee's bonds, or part cash and part such bonds, we think it cannot be said that the transferor retains any pecuniary interest in the enterprise. On the contrary, he becomes a creditor of the transferee; and we do not think that the fact referred to by the Circuit Court of Appeals, that the bonds were secured solely by the assets transferred and that, upon default, the bondholders would retake only the property

> sold, changes his status from that of a creditor to one having a proprietary stake, within the purview of the statute."

Judge Mathews, in his concurring opinion, held with the Commissioner on an independent analysis of the statutes and concluded by distinguishing the problems of the Kitselman and the Newberry cases from this case and the LeTulle and Tyng cases. It is unnecessary to debate the validity of this distinction, for Judge Mathews, since the Marlborough decision, appears to agree with the Commissioner that they have been overruled. In the case of *Commissioner vs. Palm Springs Holding Corporation*, decided May 14, 1941, Judge Mathews uses the following language:

> "The contrary view derives no support in *Commissioner vs. Kitselman* (7th Circuit, 89 Fed. (2nd) 458), or from *Commissioner vs. Newberry Lumber & Chemical Co.*, (C. C. A. 6th) (94 Fed. (2nd) 447), for the Kitselman and Newberry cases, so far as revelent here, were in effect overruled by *LeTulle vs. Schofield and Helvering vs. Tyng*, supra."

Judge Mathews' idea of distinguishing the Kitselman and Newberry cases was not suggested by the Commissioner's attorneys. On the contrary the government's attorneys in the present case, both in brief and oral argument before the Ninth Circuit, frankly admitted that the Kitselman and Newberry cases supported the taxpayer's position and contended that these cases were specifically overruled by the LeTulle decision.

Applying the LeTulle decision, the majority of

the Ninth Circuit suggested as reasons to support the Marlborough decision that there was a lack of continuity of proprietary interest that your decisions require, and that a reorganization in the bankruptcy sense may be something from a revenue act reorganization.

The cases and texts we have heretofore cited, and the decision of the Fifth Circuit on May 5, 1941, in the *Alabama Asphaltic Limestone* case, Docket No. 9569, — Fed. (2nd) — (hereafter considered), set forth arguments which we submit should satisfy you that there is no lack of continuity of proprietary interest in the present case.

Judge Wilbur was unwilling to apply the analogy under a reorganization under Section 77 (b) of the Bankruptcy Act (In re 630 *Church St. Corporation*, 299 U. S. 24) to the reorganizations within the exceptions of Section 112 and Section 113 of the Revenue Act of 1932.

When the stockholders' equitable interest has disappeared owing to insolvency of the corporation, the Bankruptcy Law admittedly permits a reorganization in which creditors only are permitted to participate (*Case vs. Los Angeles Lumber Company*, 308 U. S. 106). True, such bankruptcy reorganizations may be as Judge Wilbur says, "advan geous to the creditors and therefore within the po..cy of the Bankruptcy Act," but is it not equally true that a reorganization under Section 112 of the Revenue

Act may still be "advantageous to the creditors" and therefore within the policy of the Revenue Act?

Section 111 of the 1932 Act, computation of gain or loss, reads as follows:

> "(a) Except as hereinafter provided in this section, the gain from the sale or other disposition of property shall be the excess of the amount *realized* therefrom over the adjusted basis provided in section 113 (b), and the loss shall be the excess of such basis over the amount *realized*.
>
> "(b) Amount Realized. The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received." (Id, page 510)

Realization of gains and losses on sales and other dispositions of property are the subjects dealt with in Subtitle B, Part II of the Revenue Act of 1932.

Under the present circumstances there has been no realization of profit or loss in the disposition of the property. The stock equity has disappeared with insolvency prior to disposition. The same properties are still operated for the benefit of the same substantial owners. There seems no substantial reason why a reorganization for the benefit of stockholders should be within the Revenue Act but a reorganization for the benefit of bondholders excluded from the Revenue Act. If such a distinction is valid, a premium is given to the worthless stock interest because it can say to the secured

creditor, who has become the substantial owner, "Give us a participation in the reorganized company thereby gaining our base for depreciation and on future sales, otherwise you must accept the present depressed value."

This is out of harmony with your bankruptcy holdings and is unsound in policy and, we submit, illustrates the fallacies of Judge Wilbur's distinction.

3. The Circuit Court of Appeals for the Ninth Circuit erred in interpreting the holdings of the *LeTulle vs. Scofield*, supra, and *Helvering vs. Tyng*, supra, as overruling the cases of *Commissioner vs. Kitselman*, supra, and *Commissioner vs. Newberry L. & C. Co.*, supra.

As was aptly said by the Board of Tax Appeals in the case of *Agnes Neustadt*, 43 BTA ——, Docket No. 99935, March 15, 1941, LeTulle and Tyng cases really involved transactions where sales were "lurking in the disguise of reorganizations."

Both the difficulty of analyzing and applying the principle of continuity of proprietary interest and the proper interpretation of the LeTulle case is probably best illustrated in the decision of the Board of Tax Appeals rendered February 14, 1940, in *Alabama Asphaltic Limestone Company case*, 41 B.T.A. 324. The majority of the Board followed the Kitselman and Newberry cases and distinguished

the LeTulle decision. Two members of the Board dissented without opinion. Two members concurred in a dissenting opinion by Murdock. Disney filed an additional dissenting opinion, as did Melott. It is significant, however, that the Board since that date has consistently held to the rule of the Kitselman and the Newberry cases.

The Circuit Court of Appeals of the Fifth Circuit on May 5, 1941, affirmed the Board in the *Alabama Asphaltic Limestone Company case,* Docket No. 9569, —— Fed. (2nd) ——. This case deals with the identical problem of the Marlborough, namely, the depreciation basis. The creditors, though without liens, were stepped up by insolvency into a proprietary position. The opinion is as follows:

"(*Reorganization v. Sale*)

This was a typical reorganization through a court sale of an insolvent corporation. We think it was a reorganization rather than a gain-and-loss-realizing-sale under the income tax laws. The definitions of reorganizations in Revenue Act of 1928, Sec. 112 (i), contemplate that there be transfers of title by sale. No difference is indicated between a private and a court sale. What is important is the purpose or plan, and the result of the sale, as defined by the statute. We follow the Board in applying the words of Sec. 112 (i) (1): 'The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of * * * substantially all the properties of another corporation).' As settled in *LeTulle vs. Scofield,* 308 U. S. 415 (40-1 USTC, §9150), and cases cited on page 420, acquisition by simple sale for cash, or cash and notes

or bonds, is not meant, but on acquisition which has the character of a merger, a transfer bodily of the properties of one corporation to another, accompanied by a retention of a 'substantial stake,' a 'proprietary interest,' in the acquiring corporation by those interested previously in the properties. The LeTulle case and *Helvering vs. Tyng*, 308 U. S. 527 (40-1 USTC, §9152), settled that such 'proprietary interest' is not retained by the transferror becoming a creditor of the acquiring corporation. They are not like the present case, for the whole capital stock here was taken by the transferror. The question here, not present in those cases, is What sort of relationship to the transferring corporation must those have who ultimately receive the stock which is paid to the transferring corporation? Must they be stockholders in the latter?"

(*Relationship of Noteholders to Transferring Corporation*)

In the case of a merger, the transferring corporation ceases to do business. What is paid for its properties goes to discharge its debts first, and the remainder to its stockholders, if solvent. When it is confessedly insolvent, or is so adjudged as in this case, the stock is valueless, the assets have become a trust fund for the benefit of the creditors. The officers are trustees and the creditors the beneficiaries. So in bankruptcy, the creditors alone make determinations and control the disposition of the property. The corporation is not dead, it still has title to its properties, but the creditors rather than the stockholders are the beneficial owners. We are of opinion that an insolvent corporation can be merged or reorganized by a transfer of its properties in accordance with the wishes of its creditors, either by act of the corporation or by a judicial sale by a court acting for that purpose. The consideration, since the business of the old corporation is at an end,

will be distributed to its creditors rather than its stockholders, because the proprietary interest in the properties is, since the insolvency, in them. What distinguishes the transaction as a merger rather than a sale is that what is paid for the properties is not money or a money measured obligation, but in whole or substantial part stock in the acquiring corporation, so that the former proprietors of the property continue to have a proprietary interest in it. In this case, but for the two dissenters, there would have been no sale at all, the noteholders would have taken stock in the old instead of the new corporation, the former capital stock being ignored or subordinated because of the financial condition of the company. What has happened was not intended by the parties or the court as a sale, but a reorganization by merger. Tax consequences on that basis are in accordance with the truth and justice of the case. *Commissioner vs. Southwest Consolidated Corporation,* —— Fed. (2) ——; *Commissioner vs. Kitselman,* 89 Fed. (2) 458 (37-1 USTC, §9237); *Commissioner vs. Newberry L. & C. Co.,* 94 Fed. (2) 447 (38-1 USTC, §9110). The noteholders were in fact informal stockholders in the transferring corporation, according to *Arnold vs. Phillips,* —— Fed. (2) ——."

The Fifth Circuit had already arrived at practically the same conclusion in *Commissioner vs. Southwestern Consolidated Corporation,* —— Fed. (2nd) ——, decided April 19, 1941.

For these reasons it would seem that the LeTulle and Tyng cases have been misinterpreted by the Ninth Circuit.

4. The Circuit Court of Appeals erred in holding that there was a lack of continuity of proprietary inter-

est between the Marlborough Investment Company, the Committee, and the Marlborough House, Inc., because the stockholders of the predecessor, the Marlborough Investment Company, did not participate in the stock of the Marlborough House, Inc.

Commissioner vs. Newberry L. & C. Co., 94 Fed. (2nd) 447 (C. C. A. 6th);
Commissioner vs. Kitselman, 98 Fed. (2nd) 458 (C. C. A. 7th);
Alabama Asphaltic Limestone Company vs. Commissioner, Docket No. 9569, — Fed. —.

5. The Circuit Court of Appeals erred in failing to hold that Section 113 (a) (7) was applicable to the facts found by the Board, even if Section 113 (a) (6) cited in the Board's opinion was inapplicable.

Judge Mathews in his concurring opinion in the present case attempted to analyze the applicable Revenue Statutes and said in part:

> "The Board did not hold, nor do the taxpayers contend, that either of the exchanges here involved was an exchange described in §112 (b) (1), 112 (b) (2), 112 (b) (4), 112 (b) (5), 112 (c), 112 (d) or 112 (e). The implied holding (12) that they were exchanges described in §112 (b) (3) was, as I have shown, inconsistent with the findings and contrary to the evidence. There was, therefore, no basis for holding that these cases or either of them came within the exception specified in §113 (a) (6). The Board *did not hold, nor do the taxpayers contend, that either of the cases came within any of the other exceptions specified in* §113 (a)." (Italics supplied)

We respectfully submit that the learned justice was in error in the italicized statement. Both the Board and the taxpayers were relying upon, cited and argued Newberry Lumber & Chemical Co. case as controlling the issues, and the Newberry Lumber Company case specifically turns on subdivision 113 (a) (7). In addition the taxpayer was relying upon, cited and argued other decisions of the Board of Tax Appeals including *Alabama Asphaltic Limestone Company vs. Commissioner*, 41 B. T. A. 324, which specifically turn upon Section 113 (a) (7).

It is not our understanding of the law that the Board's decision should be reversed because the Board has neglected to cite all of the sections of the Revenue Act that might be applicable. When the Board's opinion clearly showed reliance upon the Newberry Lumber & Chemical Company case, we submit it would be unreasonable to assert that the applicable section of the statute had not been relied on because other sections of the statute also had been cited.

But if there is any merit in Justice Mathews' position, yet Section 113 (a) (7) entitled the taxpayer to the basis he has claimed, the Board should not have been reversed merely because it had failed to specifically say it was applying Section 113 (a) (7). The findings of the Board should have been taken and the law applied even if the reasoning of the Board was erroneous. *Helvring vs. Gowran*, 302

U. S. 238, *Hormel vs. Helvering*, —— U. S. ——, decided March 17, 1941.

In any event the petition for rehearing specifically invited the judges of the Ninth Circuit to consider the application of Section 113 (a) (7) to the facts as found by the Board, which they failed to do.

6. The Circuit Court of Appeals erred, after holding there was a break in the continuity of proprietary interest, in refusing to consider the cash advanced by the Committee plus the par value and cost of bonds, a total of $466,968, as the basis of the cost of the property under Section 113 (a) of the 1932 Revenue Act, rather than the amount bid at the foreclosure sale, $340,425.

In view of the conclusion reached by the Ninth Circuit that there had been a break in the continuity of proprietary interest, which prevented the taxpayer from having the benefit of the basis of the Marlborough Investment Company for depreciation, it seems inevitable that the taxpayer was entitled to a determination of the taxable effect of such a break in continuity.

Section 113, (a) of the Act of 1932 makes the basis of property its cost with exceptions which the Ninth Circuit holds are inapplicable. What does the record show as the cost to the Bondholders Committee?

The Marlborough Investment Company was insolvent and foreclosure proceedings were pending. On July 1, 1933, the Bondholders Committee re-

ceived possession, conveyances from the record owners of the mortgaged property and the insolvent Marlborough Investment Company approved the entry of a decree of foreclosure on that date. The Committee was trustee for all the bondholders who deposited their bonds. To secure the possession and conveyance, on July 1, 1933, the Committee paid $10,025. Through the Committee's agent, the property was managed from July 1 to November 20, 1933, and in the meantime a foreclosure sale was conducted at which the Bondholders Committee purchased the property for a deposit of bonds of a face value of $441,100, together with $6,425.64 cash to cover expenses of the proceedings and an additional sum of $9,418.24 cash to pay off non-depositing bondholders.

Because of the broad powers given the Bondholders Committee by the deposit agreement, the Commissioner claimed the right to tax the Committee as an association with corporate powers. In this the Commissioner was sustained by the Board of Tax Appeals, 40 B. T. A. 882. The Committee did not attempt to appeal this ruling of the Circuit Court.

Section 1111, subdivision (a) (2) of the Act of 1932 defines "corporations" as follows:

> "(a) When used in this Act—* * * (2) the term 'corporation' includes associations, joint-stock companies, and insurance companies."

It follows that the term "corporation" as used in Section 113 (a) (8) and Section 114 (b) (5) must apply to the transfer of the physical assets to the Bondholders Committee entitling the Bondholders Committee to retain their original investment cost in the bonds for their basis of gain and loss. The Committee took the same basis for depreciation and gain and loss on future disposition as held by the individual bondholders. *Morrissey vs Commissioner,* 296 U. S. 344. The Committee, therefore, is in the position as if it had invested in cash and in bonds it held in trust for the bondholders a total of $466,968.

The Commissioner only allowed the price bid at the September 20, 1933, foreclosure sale, $340,425, instead of the cost to the bondholders and Committee of $466,968.

The bondholders did not sell or dispose of their bonds by depositing them with the Committee, nor did the Committee sell or dispose of the bonds in the foreclosure sale. The bonds were merely deposited with the sheriff in part payment of the purchase price. They were endorsed with a pro rata portion as a payment. The property, none the less, had cost the bondholders the full face value of the bonds. The Marlborough Investment Company being insolvent and all of its assets having been delivered over to the Committee prior to the sale, the true

cost to the Committee was $466,968, since a deficiency judgment against the insolvent corporation was obviously worthless.

The taxpayer and the Commissioner are in agreement that the basis of assets to Marlborough House, Inc., is the cost to the Committee since the assets were transferred to the Marlborough House, Inc., pursuant to Section 112 (b) (5) and Section 113 (b) (8) of the Act of 1932. Under the same logic, the basis of the assets to the Committee should be cost to the depositing bondholders since the Committee has been held to be an association and must be treated as a corporation and the bondholders are the only interested stockholders of the Committee.

CONCLUSIONS

FIRST, this case is particularly appropriate for review because the transactions involve a reorganization within the appropriate sections of the Revenue Act of 1932, contrary to the holding of the Circuit Court of Appeals in the Ninth Circuit;

SECOND, the Circuit Court's decision is in conflict with the Newberry and the Kitselman cases with many Board decisions both before and since this case was decided by the Circuit Court;

THIRD, the decision of the Ninth Circuit misapplies and misconstrues the holding in *LeTulle vs. Scofield* and *Commissioner vs. Tyng;*

FOURTH, the holding of the Ninth Circuit is in conflict with more recent cases of *Commissioner vs. Alabama Asphaltic Limestone Co.* and *Commissioner vs. Southwest Consolidated Corporation*, of the Fifth Circuit;

FIFTH, the question of law involved is in confusion and should be clarified and is of wide importance in the administration of the Revenue Laws of the United States;

SIXTH, the decision of the Ninth Circuit is a departure from the accepted and usual decisions on the subject made and should be corrected.

Respectfully submitted,

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APPENDIX

Sections of the 1932 Revenue Act, 26 U. S. C. A., Internal Revenue Acts:

§ 23 Deductions from Gross Income

In computing net income there shall be allowed as deductions:

(k) Depreciation. A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence. * * * (p. 491)

(m) Basis for Depreciation and Depletion. The basis upon which depletion, exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be provided in section 114. (p. 491)

§ 114 Basis for Depreciation and Depletion

(a) Basis for Depreciation. The basis upon which exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be the adjusted basis provided in section 113 (b) for the purpose of determining the gain or loss upon the sale or other disposition of such property. (p. 519)

§ 113 Adjusted Basis for Determining Gain or Loss

(b) Adjusted Basis. The adjusted basis for determining the gain or loss from the sale or other disposition of property, whenever acquired, shall be the basis determined under subsection (a), adjusted as hereinafter provided. (p. 518)

§ 113 Adjusted Basis for Determining Gain or Loss

(a) Basis (Unadjusted) of Property. The basis of property shall be the cost of such property; except that—

(6) Tax-free exchanges generally. If the property was acquired upon an exchange described in section 112 (b) to (e), inclusive, the basis shall be the same as in the case of the property exchanged, decreased in the amount of any money received by the taxpayer and increased in the amount of gain or decreased in the amount of loss to the taxpayer that was recognized upon such exchange under the law applicable to the year in which the exchange was

made. If the property so acquired consisted in part of the type of property permitted by section 112 (b) to be received without the recognition of gain or loss, and in part of other property, the basis provided in this paragraph shall be allocated between the properties (other than money) received, and for the purpose of the allocation there shall be assigned to such other property an amount equivalent to its fair market value at the date of the exchange. This paragraph shall not apply to property acquired by a corporation by the issuance of its stock or securities as the consideration in whole or in part for the transfer of the property to it. (p. 515)

(7) Transfers to corporation where control of property remains in same persons. If the property was acquired after December 31, 1917, by a corporation in connection with a reorganization, and immediately after the transfer an interest or control in such property of 50 per centum or more remained in the same persons or any of them then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon such transfer under the law applicable to the year in which the transfer was made. This paragraph shall not apply if the property acquired consists of stock or securities in a corporation a party to the reorganization, unless acquired by the issuance of stock or securities of the transferee as the consideration in whole or in part for the transfer. (p. 516)

(8) Property acquired by issuance of stock or as paid-in surplus. If the property was acquired after December 31, 1920, by a corporation—

(A) by the issuance of its stock or securities in connection with a transaction described in section 112 (b) (5) (including, also, cases where part of the consideration for the transfer of such property to the corporation was property or money, in addition to such stock or securities), or * * * (p. 516)

§ 112 Recognition of Gain or Loss

(a) General Rule. Upon the sale or exchange of

roperty the entire amount of the gain or loss, de-
ermined under section 111, shall be recognized,
xcept as hereinafter provided in this section.

b) Exchanges Solely in Kind—

* * (3) Stock for stock on reorganization. No
ain or loss shall be recognized if stock or securities
n a corporation a party to a reorganization are, in
ursuance of the plan of reorganization, exchanged
olely for stock or securities in such corporation or
n another corporation a party to the reorganiz-
tion.

4) Same—Gain of corporation. No gain or loss
hall be recognized if a corporation a party to a
eorganization exchanges property, in pursuance
f the plan of reorganization, solely for stock or
ecurities in another corporation a party to the
eorganization.

5) Transfer to corporation controlled by trans-
eror. No gain or loss shall be recognized if prop-
rty is transferred to a corporation by one or more
ersons solely in exchange for stock or securities
n such corporation, and immediately after the ex-
hange such person or persons are in control of the
orporation; but in the case of an exchange by two
r more persons this paragraph shall apply only if
he amount of the stock and securities received by
ach is substantially in proportion to his interest in
he property prior to the exchange. (p. 511)

(i) Definition of Reorganization. As used in this
ection and sections 113 and 115—

(1) The term "reorganization" means (A) a mer-
er or consolidation (including the acquisition by
ne corporation of at least a majority of the voting
tock and at least a majority of the total number of
hares of all other classes of stock of another cor-
oration, or substantially all the properties of an-
ther corporation), or (B) a transfer by a corpora-
ion of all or a part of its assets to another corpora-
ion if immediately after the transfer the transferor
r its stockholders or both are in control of the
orporation to which the assets are transferred, or

(C) a recapitalization, or (D) a mere change in identity, form, or place or organization, however effected.

(2) The term "a party to a reorganization" includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation. (p. 513, 514)

§ 111 Determination of Amount of Gain or Loss

(a) Computation of Gain or Loss. Except as hereinafter provided in this section, the gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 113 (b), and the loss shall be the excess of such basis over the amount realized.

(b) Amount Realized. The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received. (p. 510)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 128
No. 129

BONDHOLDERS COMMITTEE, MARLBOROUGH INVESTMENT COMPANY, FIRST MORTGAGE BONDS, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

MARLBOROUGH HOUSE, INC., a corporation, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

REPLY BRIEF OF PETITIONERS.

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REPLY BRIEF OF PETITIONERS.

Respondent under B pages 9 to 14 has raised a point not made before the Board of Tax Appeals or before the court below.[1]

(a) Issues. Petitioners before the Board of Tax Appeals raised two issues; (1) Depreciation should be on 30 years remaining life of the building instead of 45 years as determined by the Commissioner and (2) the cost of the building

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[1] See Respondent's Brief, p. 9, note 8.

should be $379,045.67 instead of the amount bid at the foreclosure sale. (R. 214 and 17.)

(b) Board Hearing. At the hearing, the applicability of the rule of *Kitselman* and *Neberry* cases was suggested and the Board applied this rule in its decision of November 7, 1939. (R. 43) The Commissioner and the taxpayers filed an agreed recomputation of the taxes February 17, 1940 and the order determining the litigation was entered February 26, 1940. (R. 43)

(c) This Court decided *LaTulle* v. *Scofield*, January 2, 1940, and rehearing was denied January 29, 1940.

(d) The Commissioner sought review May 13, 1940. His Brief in the court below claimed reversal on the application the *LaTulle* case[2] and its reversal of the *Kitselman* case.[3]

(e) The Commissioner did not oppose the Petitioner's Petition to this Court for a Writ of Certiorari but at p. 2 of its memorandum said: "This conclusion (of the Court below that neither Section 113(a)(6) or (a)(7) was avail-

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[2] Commissioner's Brief in court below p. 11. "The decision of the Board proceeds upon the theory that since the stockholder interest in the old corporation had been eliminated by virtue of insolvency and default upon its bonds, the bondholders of such corporation could be treated as occupying the status of stockholders and of the corporation itself, that under this view a statutory reorganization had been effected. * * * The reasoning of the Board is directly contrary to the recent decision of the Supreme Court in La Tulle v. Scofield. * * *" At p. 18. "Only the old corporation (Marlborough Investment Company) and its stockholders had a proprietary interest in the corporation's assets up to the time of the sale through the foreclosure proceedings. As a result of this sale such proprietary interest was severed—all interest of the prior owners was eliminated." At p. 23. "In the instant case it is clear that when the foreclosure sale deprived the Marlborough Investment Company of its assets in 1933, the *stockholders* of that company were entitled to take a loss."

[3] Commissioner's Brief in court below, p. 27. "The position of the Government here, it will be noted, assumes the reversal of the *Kitselman* rule by reason of the *La Tulle* decision."

able to the Petitioners) rests on the view that a transaction which transfers the ownership of an enterprise from its stockholders to its creditors does not provide the continuity of proprietary interest essential to a 'reorganization' under the revenue laws."

(f) Only on January 9, 1942, when Petitioners received the Commission's Brief in this Court were they advised of his new position.

Matters of this sort not made below and made here for the first time cannot and should not be permitted.

> *Burnet* v. *Commonwealth Imp. Co.*, 287 U. S. 415, 418.
> *Helvering* v. *Tex-Penna. Oil Co.*, 300 U. S. 481, 497.
> *Helvering* v. *Wood*, 309 U. S. 344.

The findings of fact made by the Board of Tax Appeals do not bear out the statements on page 9 of Respondent's Brief. The Board found: "The basis for depreciation in the property in the hands of the bondholders' committee and Marlborough House, Inc., was the same as in the hands of the Marlborough Investment Co., less depreciation already taken by the latter." (R. 35)[4]

It may be argued that the findings also recite a conveyance from record owners (R. 31) but there is nothing in the findings to support the assertion at page 9 of Respondent's Brief that neither Marlborough Investment Co. or its stockholders "any longer had any interest in the assets." The foregoing finding is inconsistent therewith. In addition, to carry out the plan of reorganization the Marlborough Investment Co. approved the decree of foreclosure (R. 154 at 163), the foreclosure sale went forward and was confirmed to the Committee. The Certificate of Purchase was assigned to Marlborough House, Inc., and the Sheriff's deed was issued directly to it. (Board's Findings p. 33)

[4] The Commissioner argued to the Board that the foreclosure sale severed the interest of Marlborough Investment Co. and its stockholders and so invited this finding which is more than an ultimate conclusion.

The statute confers the duty and power to the Board alone to find facts. Neither this Court nor the Circuit Court of Appeals has power to comb the evidence and find or re-find facts.

Helvering v. *Rankin*, 295 U. S. 123 at 131, 132.

Respectfully submitted,

W. Z. KERR,
For Petitioner.

FILE COPY

Nos. 128, 129

In the Supreme Court of the United States

OCTOBER TERM, 1941

BONDHOLDERS COMMITTEE, MARLBOROUGH INVESTMENT COMPANY, FIRST MORTGAGE BONDS, A CORPORATION, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

MARLBOROUGH HOUSE, INC., A CORPORATION PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 128

BONDHOLDERS COMMITTEE, MARLBOROUGH INVESTMENT COMPANY, FIRST MORTGAGE BONDS, A CORPORATION, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

No. 129

MARLBOROUGH HOUSE, INC., A CORPORATION, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

The Government does not oppose the granting of writs of certiorari in these cases.

The question is the basis for depreciation, under Sections 23 (k), 113 and 114 (a) of the Revenue Act of 1932, of corporate assets bought in at equity foreclosure sale by a bondholders' committee, and thereafter transferred to a new corporation in return for a distribution to depositing bondholders of all of the new corporation's common stock. It is agreed that by virtue of Sections 113 (a) (8) and 112 (b) (5) of the Act the basis of the property will be the same in the hands both of the committee (No. 128) and of the new corporation (No. 129).

The court below sustained the Commissioner's determination that the basis was the price paid for the assets at the foreclosure sale. It upheld the position that the assets were not acquired in connection with a "reorganization" within the definitions of Section 112 (i) (1) of the Act, and that therefore the basis of the property in the hands of the old corporation would not carry over under either Section 113 (a) (6) or (a) (7).

This conclusion rests on the view that a transaction which transfers the ownership of an enterprise from its stockholders to its creditors does not provide the continuity of proprietary interest essential to a "reorganization" under the revenue laws. The Commissioner has taken this position in the light of this Court's decisions in *LeTulle* v. *Scofield*, 308 U. S. 415, and *Helvering* v. *Tyng*, 308 U. S. 527.

The Commissioner's determination has been challenged successfully in a number of similar cases before the Board of Tax Appeals. In each instance the Government has filed petitions for review with the Circuit Court of Appeals. The Circuit Court of Appeals for the Ninth Circuit has sustained the Commissioner both in the instant case and in *Commissioner* v. *Palm Springs Holding Corp.*, decided May 14, 1941, not yet officially reported but found in 1941 C. C. H., Vol. 4, par. 9470. A contrary result, however, has been reached by the Circuit Court of Appeals for the Fifth Circuit in *Commissioner* v. *Southwest Consolidated Corp.*, decided April 19, 1941, not yet reported but found in 1941 C. C. H., Vol. 4, par. 9402, and in *Commissioner* v. *Alabama Asphaltic Limestone Co.*, decided May 5, 1941, not yet reported but found in 1941 C. C. H., Vol. 4, par. 9452. The Government intends to file petitions for writs of certiorari in these cases. The question is also pending before the Circuit Courts of Appeals for the Second Circuit (*Commissioner* v. *Meyer Buchman; Commissioner* v. *New Haven & Shore Line Ry. Co.*), for the Eighth Circuit (*Commissioner* v. *New President Corp.*), and for the Tenth Circuit (*Commissioner* v. *James Q. Newton Trust* and *Commissioner* v. *James Q. Newton, Jr.; Commissioner* v. *Cement Investors, Inc.*).

Accordingly, although we believe the instant case was correctly decided by the court below, we

do not oppose the granting of the writs in view of the conflict between the circuits and the manifest importance of the question in the administration of the revenue laws.

Respectfully submitted.

CHARLES FAHY,
Acting Solicitor General.

JULY 1941.

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Nos. 128–129

In the Supreme Court of the United States

OCTOBER TERM, 1941

BONDHOLDERS COMMITTEE, MARLBOROUGH INVESTMENT CO. FIRST MORTGAGE BONDS, A CORPORATION, AND MARLBOROUGH HOUSE, INC., A CORPORATION, PETITIONERS

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

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ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 23–43) is reported at 40 B. T. A. 882. The opinions in the Circuit Court of Appeals for the Ninth Circuit (R. 262–281), are reported in 118 F. (2d) 511.

JURISDICTION

The judgments of the Circuit Court of Appeals for the Ninth Circuit were entered March 8, 1941. (R. 282–283.) The petition for writs of certiorari was filed on June 5, 1941, and was granted October 13, 1941. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Pursuant to plan, a bondholders' committee bought in the mortgaged assets by paying cash to the record owners and foreclosing. The committee thereafter transferred the properties to a new corporation in return for a distribution to depositing bondholders of all of the new corporation's common stock.

The question is whether the committee and the new corporation, in computing depreciation, are entitled to use the same basis the properties had in the hands of the original corporate mortgagor. The answer depends, first, upon whether the assets were acquired in a "reorganization" under Section 112 (i) (1) of the Revenue Act of 1932, and secondly, upon whether in any event Section 113 (a) (7) would provide the basis claimed in the circumstances of this case.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra*, pp. 17–21.

STATEMENT

The material facts found by the Board of Tax Appeals may be summarized as follows:

On May 20, 1927, the Marlborough Investment Co., a corporation, issued its bonds in the aggregate principal sum of $500,000. These bonds were secured by a mortgage or deed of trust upon the corporation's apartment building in Seattle, Washington, known as the Marlborough House, and upon the personal property within it. (R. 26.)

There was a default in payment of the bonds on May 10, 1932. Shortly thereafter a bondholders' committee was organized. A written deposit agreement was executed,[1] and the holders of $441,100 of face value bonds, or more than 97% of the total of $453,900 then outstanding, deposited their bonds under the agreement. (R. 26, 31.)

On August 26, 1932, the National Bank of Commerce of Seattle, trustee under the mortgage, commenced foreclosure proceedings pursuant to the written request of the bondholders' committee. While these proceedings were pending, the trustee and certain of the defendants to the foreclosure action entered into a stipulation, dated July 1, 1933, under which the parties consented to the entry of a foreclosure decree and the record owners of the property (State Developers, Inc., and

[1] The agreement, together with a copy of the certificate of deposit, is set out in full at R. 86–109.

Russell L. Cooley and Lillian A. Cooley) executed and delivered a quit claim deed to the properties in consideration of a payment of $10,025 in cash.[2] (R. 31.)

Under the stipulation, the parties further agreed to turn over possession of the real estate and personalty to the trustee or its nominees. (R. 32.) On the same date, July 1, 1933, the judgment and decree of foreclosure were entered in accordance with the stipulation. (R. 33.) The committee provided the $10,025 required to purchase the property from the record owners, and the deeds were executed. (R. 32.) The deeds left the name of the grantee blank, but the stipulation authorized the trustee's attorneys to insert the grantee's name. (R. 31, 32.) The committee was named as nominee by the trustee to take possession of the properties. From July 1, 1933, until November 20, 1933, Russell C. Perkins, as agent

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[2] The record shows, although these facts were not adverted to in the Board's findings, that on December 31, 1928, the Marlborough Investment Co. had transferred the properties to the F. S. Stimson Company by warranty deed. (R. 135–137.) The F. S. Stimson Company subsequently changed its name to Stimson-Moore Co. (R. 138), and on June 3, 1931, Stimson-Moore conveyed the properties, likewise by warranty deed, to Gardner J. Gwinn, Inc. (R. 139–141.) These conveyances were made subject to the existing mortgage debt.

On February 26, 1932, there was a further conveyance by Gwinn, Inc., to State Developers, Inc., the purchaser assuming the mortgage liability. (R. 142–143.) State Developers, Inc., quit-claimed an undivided one-half interest in the properties to Russell L. Cooley on May 13, 1932. (R. 144–145.)

for the committee, managed the property, collected the rents, and paid the expenses. (R. 32.)

On September 30, 1933, the sheriff's foreclosure sale was held, and the bondholders' committee was the successful bidder and purchaser for a bid price of $340,425. This price was paid by a surrender of the deposited bonds plus cash. Neither the fair market value of bonds deposited with the committee plus the cash used in partial payment nor the fair market value of the property was in excess of $340,425 at the date of the foreclosure sale or on July 1, 1933. (R. 33, 34.)

On or about November 10, 1933, the bondholders organized Marlborough House, Inc., a corporation, to take over and manage the property acquired at the foreclosure sale. (R. 32.) Following confirmation of the sheriff's sale, the sheriff's certificate of purchase covering the property was made out to the bondholders committee and was assigned by the committee to Marlborough House, Inc. After the redemption period had passed, the sheriff's deed was issued directly to the corporation as assignee of the bondholders committee. (R. 33.)

After Marlborough House, Inc., was organized and took possession of the property, it issued all of its stock to the depositing bondholders of Marlborough Investment Co. (R. 34.) Non-depositors were paid in cash their pro rata share of the purchase price after deduction of their share of the cost of the foreclosure; this resulted in a payment

of 73.58% of the face value of their bonds. (R. 33–34.)

On September 28, 1938, the attorneys for the mortgage trustee filled in the name of Russell C. Perkins, trustee for the bondholders committee, as grantee in each of the quit claim deeds from State Developers, Inc., and the Cooleys, and on the same date Perkins, as trustee, delivered the quit claim deeds covering the property to Marlborough House, Inc. (R. 32.)

The steps taken by the committee in instituting the foreclosure and until the final vesting of title in the Marlborough House, Inc., were pursuant to a plan of reorganization formulated by the committee for the benefit of the bondholders in pursuance to the powers granted it by the agreement. (R. 34.)

In determining the income tax liability of the committee for the period from July 1, 1933, to November 21, 1933,[3] and of the new corporation for the remainder of the calendar year 1933 and for the years 1934 and 1935, the Commissioner used as the basis for computing depreciation the cost of the assets to the committee, taking, as representing the cost, the price bid at the foreclosure sale. (R. 25.) The Board of Tax Ap-

[3] The Board of Tax Appeals sustained the Commissioner's determination that the committee was taxable as a corporation. (R. 39–40.) The statute defines the term "corporation" to include "associations." Revenue Act of 1932, Section 1111 (a) (2). The committee did not petition for review of this determination by the Circuit Court of Appeals.

peals rejected the Commissioner's position, and decided that the committee and the new corporation had acquired the assets in connection with a reorganization and therefore were entitled to use the basis that the assets had in the hands of the old corporation less the depreciation already taken by the corporation. (R. 38.) The Circuit Court of Appeals reversed.

ARGUMENT

A.

These cases, like the three companion proceedings before the Court,[1] involve the problem of the tax consequences of readjustments in which corporate bondholders become the stockholders of a new corporation which succeeds to the business of the old. The immediate issue here is whether the committee which bought in the assets and the new corporation to which the assets were transferred are entitled to use the basis of the original corporate mortgagor in computing depreciation.

The Government's primary position, which we have developed in full in our brief in the *Southwest Consolidated* case, is that transactions of this character do not qualify as a reorganization within

[1] *Commissioner* v. *Southwest Consol. Corp.*, 119 F. (2d) 561 (C. C. A. 5th), certiorari granted, October 13, 1941, No. 286, this Term; *Commissioner* v. *Alabama Asphaltic Limestone Co.*, 119 F. (2d) 819 (C. C. A. 5th), certiorari granted, October 13, 1941, No. 328, this Term; and *Commissioner* v. *Palm Springs Holding Corp.*, 119 F. (2d) 846 (C. C. A. 9th), certiorari granted, October 13, 1941, No. 503, this Term.

the statutory definition. Revenue Act of 1928, Section 112 (i) (1).[5] Accordingly, the committee's basis must be the cost of the assets to it under Section 113 (a), since the exception in Section 113 (a) (7), providing for the use of the old corporation's basis, is not available. The new corporation in turn is entitled to use the committee's basis by virtue of Section 112 (b) (5) and Section 113 (a) (8).[6]

Our position rests fundamentally upon the proposition that under *LeTulle* v. *Scofield*, 308 U. S. 415, there is lacking the continuity of proprietary interest necessary for a reorganization within the purview of the statute, where a transaction shifts the ownership of a corporation from its stockholders to its creditors. This being true, there is no reorganization even though the transaction might otherwise appear to fall within the literal language of the statute. *E. g.*, *LeTulle* v. *Scofield*, supra; *Pinellas Ice Co.* v. *Commissioner*, 287 U. S. 462.[7]

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[5] Although the *Southwest Consolidated* case arises under the reorganization definition in Section 112 (g) (1) of the Revenue Act of 1934, which is somewhat different, the fundamental issue is the same. See Government's brief, *Palm Springs* case, No. 503.

[6] The taxpayers agree that under these sections the basis of the properties will be the same in the hands of the committee and the corporation. Petitioner's Brief, p. 19.

[7] The same reasons preclude any possibility of the application of Section 112 (b) (5) and the complementary basis provision of Section 113 (a) (8). Government's brief, *Southwest Consolidated* case, p. 15, fn. 9.

The practical and legal considerations which support our position have been considered in detail in our *Southwest Consolidated* brief to which the Court is respectfully referred. The court below adopted this view in deciding the instant cases. We submit that the result is correct, and that the decision below should be affirmed.

B.

Moreover, apart from our principal contentions set forth in our *Southwest Consolidated* brief, the record in this case discloses additional grounds which require affirmance of the judgment below.

1. In these cases the record shows that at the time of the acquisition of the properties by the committee, neither the old mortgagor corporation, Marlborough Investment Co., Inc., nor its stockholders any longer had any interest in the assets. Shortly after the bonds were issued, the old corporation in 1928 had conveyed the properties to third parties. In 1932, following certain mesne consequences, the properties were owned in undivided half interests by State Developers, Inc., a corporation, and Russell L. Cooley, an individual. As part of the plan of the committee to take over the assets, State Developers, Inc., and Cooley were paid $10,025 for a quit-claim deed to their interests. See fn. 2, *supra*.[8]

[8] These facts are shown by the record and have not been disputed. While they have not previously been stressed as

In light of these facts, there is no support for the Board of Tax Appeals' conclusion that the committee is entitled to use the basis of the assets in the hands of the Marlborough Investment Co., the original owner and mortgagor. That company had not owned the properties for approximately 5 years. Even if we assume the committee had acquired the assets in connection with a reorganization, or in a transaction described in Section 112 (b) (5), this could mean no more than that the basis would be the same as in the hands of State Developers, Inc. and Cooley. The correlative provisions of Section 113 (a) (7) and (8) authorize the carry-over of the basis of the assets in the hands of the "transferor", not their basis in the hands of one who occupied a remote position in the chain of ownership.*

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providing further grounds in support of the Government's position, there would seem to be no reason why they should not be taken into account. Cf. *Riley Co.* v. *Commissioner*, 311 U. S. 55; *Helvering* v. *Gowran*, 302 U. S. 238.

* The Board of Tax Appeals reasoned that there was a reorganization under Section "112 (a) (3)", and that the Committee was entitled to the basis of Marlborough Investment Co. under Section 113 (a) (6). The statute does not contain a section numbered "112 (a) (3)," and presumably the Board meant to refer to Section 112 (b) (3). The essential fallacy of approaching the problem in terms of the applicability of this Section is developed in the concurring opinion of Circuit Judge Mathews in the court below. Section 112 (b) (3) concerns the recognition of gain or loss upon the exchange of securities, "in pursuance of the plan of reorganization" (i. e., under Section 112 (i) (1)). The question

2. These facts also emphasize the absence of a continuity of proprietary interest in the new corporation. The interest of the Marlborough Investment Co. and of its stockholders, had been terminated when the corporation first sold the properties in 1928. The ownership interest of State Developers, Inc., and Cooley was terminated by an outright cash purchase, following institution of the foreclosure proceedings, and as part of a stipulation under a decree of foreclosure would be entered. It is evident that, in no sense of the term can the transaction be regarded as a reorganization of Marlborough Investment Co. or of any other corporation. Rather, the procedure by which the bondholders followed their security into the hands of third parties and then reduced it to possession and ownership, in part by paying cash and in part by foreclosure, has all the earmarks of a sale.

3. Furthermore, this transaction cannot be brought even within the application of the literal language of the reorganization definition of Section 112 (i) (1) or the non-recognition provisions of Section 112 (b) (5). While this is likewise true in the *Southwest Consolidated* case, the analysis of the problem here is somewhat different and, we submit, even clearer.

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of the basis of the assets involved, in the case of a reorganization under Section 112 (i) (1), is determined by Section ~~112~~ (a) (7).

Certainly, there could be no reorganization as between either the committee or the new corporation and the old Marlborough Investment Co., which no longer owned the properties. Clause A of the definition describes the acquisition of "the properties of another corporation"; Clause B refers to the transfer by one "corporation" of its assets to another, with the transferor or its stockholders continuing in control. Similarly Section 112 (b) (5) describes the transfer of properties to a corporation, in which the "transferor" retains control. These were not the "properties" of Marlborough Investment Co.; Marlborough Investment Co. was not the "transferor", and neither that company nor its stockholders thereafter controlled either the committee or the new corporation.[10]

It may be argued that there was a "reorganization" or a tax-free exchange as between State Developers, Inc., and Cooley on the one hand and the committee on the other. The obstacles to such a theory, however, are obvious:

(a) Since Cooley was an individual, the reorganization definition can have no application. As

[10] Question may also be raised whether in any event a committee which is taxable as a corporation by virtue of the definition contained in Section 1111 (a) is a corporation for purposes of the non-recognition and reorganization provisions of Section 112. As to the circumstances in which a committee is a "corporation" within this definition, cf. *e. g. White* v. *Hornblower*, 27 F. (2d) 777 (C. C. A. 1st); *Jackson* v. *United States*, 110 F. (2d) 574 (C. C. A. 9th).

we have stated, these provisions are limited in their coverage to inter-corporate transactions.

(b) Section 112 (b) (5), while it applies to transfers by individuals, further requires that the transferors retain control, as that term is defined in Section 112 (j), Appendix, *infra*. Here, as we have stated, State Developers, Inc., and Cooley were bought out for cash. Furthermore, the transfer to the committee was not made "solely in exchange for stock or securities in such corporation" as the section requires.[11]

4. Finally, these facts leave no room for an argument based on the theory that where a corporation is insolvent, the creditors in effect become its stockholders, so that when they take over the properties there is a continuity of proprietary interest and so that they may also be deemed the "corporation" or the "transferor" within the language of the statute. The fundamental objections to this theory are set forth in our *Southwest Consolidated* brief (pp. 25–28). Here, in any event, the theory cannot work. Upon default, the bondholders had the right to pursue their security in the hands of the existing

[11] In view of the operation of the properties by the committee for a period of some months, it is difficult to disregard the intermediate transfer to it and to analyze the transaction as a transfer of the assets directly to the new corporation. See *Southwest Consolidated* brief, pp. 19, 21–24. Nevertheless, even if that assumption is made, there would still be lacking the retention of control necessary to bring the transaction under Sections 112 (b) (5) and 113 (a) (8).

owners and to assert a claim for any deficiency against the original corporate mortgagor. Even if this right to a deficiency claim could be said to give the bondholders a proprietary interest in the old corporation, it does not follow that they had such an interest in the assets in the hands of their then owners or that the bondholders could be regarded in any sense as the equivalent of the owners of the properties. Rather the payment of $10,025 in cash to State Developers, Inc., and the Cooleys for a transfer of their interests, as part of the bondholders' plan to take over the assets, entirely negatives any such assumption. It establishes the fact that prior to the execution of the deed and the foreclosure sale the record owners, and not the bondholders, had the proprietary interest in the properties.

C.

The taxpayers have argued that if the committee's acquisition of the properties is treated as a purchase, and not as a reorganization, the cost to the committee should be measured by the amount of cash advanced by the committee plus the *face value* of the deposited bonds. No authority has been advanced for the support of this contention, and we submit that it is unsound.

As we have shown in our brief in the *Southwest Consolidated* case (p. 13, fn. 5), the cost of assets bid in by a mortgage creditor upon foreclosure

is properly measured by the market value of those assets. Regulations 77, Article 193. Obviously this cost is neither increased nor decreased by the face value of the obligations.

The taxpayers' argument assumes that the cost of the bonds to all of the individual bondholders was their full face amount. The record contains no evidence to support such a conclusion. But even if we disregard this difficulty for the sake of argument, it is fallacious to assume that the cost of the *bonds* is the cost of *assets* later received in exchange for them *in a taxable transaction.*

There are situations in which the original cost of bonds to their owners will constitute the *basis* of property received in exchange for them. Those are cases which come within the express exception to the rule of cost provided in Section 113 (a) (6) where property is exchanged in certain tax-free transactions. The taxpayers' argument, in substance, would treat as the *cost* basis in a taxable transaction the basis that the statute provides in these situations as an *exception to cost.*

D.

In the *Southwest Consolidated* case, and similarly in the *Alabama Asphaltic* case, we suggested further proceedings, if the Government's position that the basis of the old corporation should not carry over is sustained, to the extent necessary

to redetermine the deficiency using as the basis the market value of the properties rather than the bid price. This should not be necessary in the instant case. Although the Commissioner used the bid price in ascertaining the basis, it has been found that the market value of the assets did not exceed that amount.

Respectfully submitted,

CHARLES FAHY,
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J. LOUIS MONARCH,
SAMUEL H. LEVY,
Special Assistants to the Attorney General.

JANUARY 1942.

APPENDIX

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 112. RECOGNITION OF GAIN OR LOSS.

(a) *General Rule.*—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

(b) *Exchanges Solely in Kind.*—

* * * * *

(3) *Stock for Stock on Reorganization.*—No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

* * * * *

(5) *Transfer to Corporation Controlled by Transferor.*—No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation, and immediately after the exchange such person or persons are in control of the corporation; but in the case of an exchange by two or more persons this paragraph shall apply only if the amount of the stock and securities received by each

is substantially in proportion to his interest in the property prior to the exchange.

* * * * *

(i) *Definition of Reorganization.*—As used in this section and sections 113 and 115—

(1) The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation); or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place or organization, however effected.

* * * * *

(j) *Definition of Control.*—As used in this section the term "control" means the ownership of at least 80 per centum of the voting stock and at least 80 per centum of the total number of shares of all other classes of stock of the corporation.

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Basis (Unadjusted) of Property.*—The basis of property shall be the cost of such property; except that—

* * * * *

(6) *Tax-free exchanges generally.*—If the property was acquired upon an exchange described in section 112 (b) to (e), inclu-

sive, the basis shall be the same as in the case of the property exchanged, decreased in the amount of any money received by the taxpayer and increased in the amount of gain or decreased in the amount of loss to the taxpayer that was recognized upon such exchange under the law applicable to the year in which the exchange was made. If the property so acquired consisted in part of the type of property permitted by section 112 (b) to be received without the recognition of gain or loss, and in part of other property, the basis provided in this paragraph shall be allocated between the properties (other than money) received, and for the purpose of the allocation there shall be assigned to such other property an amount equivalent to its fair market value at the date of the exchange. This paragraph shall not apply to property acquired by a corporation by the issuance of its stock or securities as the consideration in whole or in part for the transfer of the property to it.

(7) *Transfers to corporation where control of property remains in same persons.*— If the property was acquired after December 31, 1917, by a corporation in connection with a reorganization, and immediately after the transfer an interest or control in such property of 50 per centum or more remained in the same persons or any of them, then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon such transfer under the law applicable to the year in which the transfer was made. This paragraph shall

not apply if the property acquired consists of stock or securities in a corporation a party to the reorganization, unless acquired by the issuance of stock or securities of the transferee as the consideration in whole or in part for the transfer.

(8) *Property acquired by issuance of stock or as paid-in surplus.*—If the property was acquired after December 31, 1920, by a corporation—

(A) by the issuance of its stock or securities in connection with a transaction described in section 112 (b) (5) (including, also, cases where part of the consideration for the transfer of such property to the corporation was property or money, in addition to such stock or securities), * * * then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon such transfer under the law applicable to the year in which the transfer was made.

* * * * * *

(b) *Adjusted basis.*—The adjusted basis for determining the gain or loss from the sale or other disposition of property, whenever acquired, shall be the basis determined under subsection (a), adjusted as hereinafter provided.

SEC. 114. BASIS FOR DEPRECIATION AND DEPLETION.

(a) *Basis for depreciation.*—The basis upon which exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be the adjusted basis provided in section 113 (b) for the purpose of determining the gain or loss upon the sale or other disposition of such property.

The relevant provisions of Regulations 86 under the Revenue Act of 1934 are set forth in the Appendix to our brief in the *Southwest Consolidated* case. Regulations 77 under the Revenue Act of 1932 do not contain provisions material to the issue.

Regulations 77, Article 193, corresponds to Regulations 86, Article 23 (k)–3, referred to in fn. 5, p. 13, of the *Southwest Consolidated* brief.

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SUPREME COURT OF THE UNITED STATES.

Nos. 128 & 129.—October Term, 1941.

Bondholders Committee, Marlborough Investment Company, First Mortgage Bonds, Petitioner, 128 *vs.* Commissioner of Internal Revenue.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.
Marlborough House, Inc., Petitioner, 129 *vs.* Commissioner of Internal Revenue.	

[February 2, 1942.]

Mr. Justice Douglas delivered the opinion of the Court.

The primary question involved in these cases is whether the transaction in question qualified as a "reorganization" under that portion of § 112(i)(1) of the Revenue Act of 1932 (47 Stat. 169, 196) which provides: "The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of . . . substantially all the properties of another corporation). . . ."

In 1927 the Marlborough Investment Co. issued its bonds in the principal amount of $500,000. They were secured by its apartment building in Seattle and the personal property therein. There was a default in May, 1932. A bondholders' committee was formed and there were deposited with it more than 97% of the total of over $450,000 face amount of the bonds then outstanding. In view of *Helvering* v. *Alabama Asphaltic Limestone Co.*, No. 328, decided this day, the precise mechanics whereby the reorganization was consummated are not material. Suffice it to say that pursuant to a plan of reorganization formulated by the committee under the broad powers accorded it in the deposit agreement, there was a foreclosure and sale; the committee was the successful bidder at the price of $340,425 which was paid by the surrender of deposited bonds plus cash; Marlborough House, Inc. was formed by the bondholders; it acquired the property from the committee and issued all of its stock to the depositing bondholders; and non-assenting bondholders were paid in cash their *pro rata* share of the purchase price.

In determining the income tax liability of the committee[1] for a par of 1933 and of the new corporation for a part of 1933 and for 193 and 1935 the Commissioner used as the basis for computing depre ciation the price bid at the foreclosure sale. The Board of Tax Ap peals found that neither the fair market value of the deposite bonds plus the cash expended in partial payment nor the fair mar ket value of the property was in excess of $340,425 at the date of th foreclosure sale or when the committee took possession. The Boar held that since the new corporation had acquired the property in connection with a "reorganization", it was entitled to use th basis in the hands of the old corporation, less depreciation. 4 B. T. A. 882. The Circuit Court of Appeals reversed. 11 F. 2d 511.

For the reasons stated in *Helvering* v. *Alabama Asphaltic Lime stone Co., supra*, this transaction clearly would have been a "reor ganization" within the meaning of § 112(i)(1) but for one fact That fact is that the property was not acquired by the committe or the new corporation from Marlborough Investment Co.[2] I December, 1928, several years prior to the insolvency reorganization Marlborough Investment Co., the issuer of the bonds, had trans ferred the property to another corporation. As a result of mesn conveyances the property was held in May, 1932 by State Developers Inc. and one Cooley. While the foreclosure proceedings were pend ing that corporation and Cooley executed and delivered a quit clai deed to the property in consideration of the payment of the cas sum of $10,025 which was furnished by the committee.

In view of these circumstances there was no "reorganization" within the meaning of § 112(i)(1). The parenthetical part clause A which is relevant here covers "the acquisition by one cor poration" of substantially all of the properties "of another cor poration". Clause B covers certain transfers "by a corporation" all or a part of its assets "to another corporation" where the trans feror or its stockholders continue in control. These were not "pro erties" of Marlborough Investment Co. It had long since ceased t own them. It was not the "transferor". Furthermore, § 113(a) (7

[1] The committee took possession of the property and managed it for a pa of the year 1933 prior to the date when the new corporation acquired it. Th Board held that the committee was taxable as a corporation on the income re ceived during that period by it. The committee did not petition for revie of that determination by the Circuit Court of Appeals.

[2] Though respondent apparently did not urge this point before the Boar or the court below, it may of course support the judgment here by any matte appearing in the record. Le Tulle v. Scofield, 308 U. S. 415, 421, and cas cited.

authorizes a carry-over of the basis of the properties[3] in the hands of the "transferor", not their basis in the hands of one who may have occupied an earlier position in the chain of ownership. Hence it is immaterial that under the rule of *Helvering* v. *Alabama Asphaltic Limestone Co.*, *supra*, the bondholders had succeeded to all of the proprietary interest in Marlborough Investment Co. The property whose basis is in controversy here was not acquired from it. Nor was there a "reorganization" as between the committee or the new corporation on the one hand and State Developers, Inc. and Cooley on the other. Cooley was an individual. The "reorganization" provisions in question cover only inter-corporate transactions. Sec. 113(a)(8) provides for a carry-over of the basis of the properties in the hands of the "transferor" if the property was acquired by a corporation after December 31, 1920, by the issuance of its stock or securities "in connection with a transaction" described in § 112(b)(5). Sec. 112(b)(5) includes transfers by individuals;[4] but it requires that the transferor remain in control. Cooley and State Developers, Inc. were bought out for cash.

It is argued that if the committee's acquisition of the properties is to be treated as a purchase rather than a "reorganization", the cost to the committee should be measured by the amount of the cash advanced by the committee plus the face value of the deposited bonds. There is no foundation for that contention. The cost of assets bid in by a mortgage creditor on foreclosure is to be determined by the fair market value of the property. See Art. 193, Treasury Regulations 77; *Helvering* v. *New President Corp.*, 122 F. 2d 92, 96-97. Although the Commissioner used the bid price in ascertaining the basis, the Board found that the market value of the assets did not exceed that amount. Respondent therefore suggests that a remand to the Board to ascertain the fair market value is not necessary. Accordingly the judgment below is

Affirmed.

MR. JUSTICE ROBERTS did not participate in the consideration or decision of this case.

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[3] By § 114(a) the basis upon which depreciation is allowed is the adjusted basis provided in § 113(b) for the purpose of determining gain or loss. By § 113(b) such adjusted basis is the basis determined under § 113(a). By § 113(a) the basis of property shall be "cost", with enumerated exceptions. One of those exceptions is contained in § 113(a)(7) set forth in Palm Springs Holding Corp. v. Commissioner, No. 503, decided this day, *ante* p. —, note 1.

[4] Sec. 112(b)(5) provides in part: "No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation, and immediately after the exchange such person or persons are in control of the corporation".